Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

THOMAS C. COLE, JR. M.D. et al.,

Petitioners,

vs.

HUNTSVILLE MEMORIAL HOSPITAL, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Texas Court Of Appeals
[First Dist.] At Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the potential chilling effect of retaliatory denial of physician staff privileges at a hospital leased from a public hospital district against a doctor who criticized board policies, including those for treatment of Medicare and other publicly-assisted patients, and ran on an "alternative slate" of candidates for the public governing board, requires a finding of state action where:

(1) the nonprofit corporation leasing the hospital shares a pecuniary interest with the hospital district because its profits pay the rent to the district to retire the government bonds used to finance construction of the facilities;

(2) the leasing corporation contracts to fulfill the public purposes of the hospital district's enabling statute, including indigent patient care;

(3) the decision to terminate the physician's privileges is based in part on the hospital's profitability because allegedly the physician has "inefficiently" and contrary to hospital "policy" used hospital resources on Medicare patients, resulting in a loss of $1 million in potential Medicare reimbursement; and

(4) the hospital's policies toward Medicare patients were part of the physician's criticism and political speech.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas is reported at 920 S.W.2d 364 and reprinted in the Appendix at App. 1. The Order of the Supreme Court of Texas refusing to reconsider its order denying discretionary review is reprinted in the Appendix at App. 33.

JURISDICTION

The Texas Supreme Court entered its order denying writ on August 1, 1996, and it denied a timely motion for rehearing on October 18, 1996. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This is a Due Process and statutory construction challenge to the "state action" requirements placed on 42 U.S.C. § 1983 by the Court of Appeals of Texas, involving Free Speech under the First Amendment.

The Free Speech Clause is found in U.S. Const. amend. I, which provides in part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Due Process Clause is found in U.S. Const. amend. XIV, § 1, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the issue whether the potential chilling effect of retaliatory denial of physician staff privileges at a hospital leased from a public hospital district against a doctor who criticized board policies and ran on an "alternative slate" of candidates for the public governing board, requires the stricter scrutiny of an *Umbehr* [*Board of County Comm'rs v. Umbehr*, ___U.S. ___, 116 S.Ct. 2342 (1996)] balancing test in analyzing whether there is state action for purposes of a 42 U.S.C. § 1983 cause of action. The Texas Court of Appeals below concluded that

because there was no "discrimination" issue raised, petitioner did not meet the higher threshold for finding state action. The facts underlying this question may be simply stated.

1. Thomas C. Cole, Jr., M.D. ("Dr. Cole" or "Petitioner") had medical staff privileges for 16 years at Huntsville Memorial Hospital ("Hospital"), a non-profit Texas corporation and the name commonly used for the hospital facility. App at 57, 59. The Hospital leases the hospital facility from Walker County Hospital District (the "Hospital District"), an elective governmental body under Texas law, under lease terms and a relationship set forth more completely in paragraphs 3 ff. below. Hospital policy requires an annual renewal application for privileges. The Hospital's medical staff Executive Committee recommended the nonrenewal of Dr. Cole's privileges in August 1987. Dr. Cole, his incorporated Professional Association, and his wife (collectively, "Petitioners") immediately filed suit in state district court for damages, temporary and permanent injunction. The suit was abated for Dr. Cole to pursue his administrative remedies.

2. The Hospital agreed to withdraw the 1987 nonrenewal recommendation notice to allow for a 1988 evaluation and administrative proceedings, if necessary. Dr. Cole's operative amended pleadings, taken as true for summary purposes, show that after the Hospital withdrew the notice, Dr. Cole ran for election to the board of managers of the Hospital District in November 1987. He and two candidates running with him defeated the three incumbent board members up for election by a substantial margin. App. at 38. Nine days after the election the Hospital served notice on Dr. Cole that the Executive

Committee would recommend that his staff privileges not be renewed for 1988. Litigation, including appellate court proceedings, prevented timely administrative resolution, and the Hospital withdrew this attempt to terminate Dr. Cole's privileges. In 1989 the Executive Committee again recommended that Petitioner's reapplication for staff privileges for 1990 be denied. The Hospital notified Dr. Cole of the recommendation and his right to a hearing. The notice stated four broad grounds for denying him privileges, including "the adverse financial impact on the Hospital caused by his patient care management and failure to abide by Hospital peer review recommendations." App. at 2-3.

3. The relationship between the Hospital and the Hospital District has both statutory and contractual components. In 1971 the Texas Legislature enacted a statute creating the Hospital District, for the purpose of constructing and operating a hospital for persons in Walker County, Texas, expressly including indigent persons. App. at 58. The legislature created the Hospital District "to furnish hospital care to persons residing in said District" and particularly "to assume the full responsibility for providing hospital care for its needy inhabitants" by means including bonded indebtedness (revenue bonds) and taxing authority. In 1977 the Texas Legislature amended the statute to grant the Hospital District the right to lease its hospital facilities to an outside manager. App. at 8. The amended enabling statute expressly authorized the Hospital District to "enter into an operating or management contract . . . and . . . delegate to the manager the power to . . . remove doctors from the staff." A 99-page contract dated July 1, 1977 states the purpose of the

Hospital District and Hospital to use the new statutory authority to replace the existing 112-bed acute care general hospital facility with a "New Hospital" to be constructed by the Hospital District then leased and operated by the charitable corporation Hospital. App. at 67. The new facility will be "a 140-bed acute care general hospital" to better meet the public needs of the Hospital District. App. at 68. The Hospital agrees to adopt the purposes of the enabling Act, including indigent medical care, and the "intent of the parties" is that the document "create a relationship between them in which the [Hospital] is associated or affiliated with or is controlled by the [Hospital] District to such an extent that the costs applicable to services, facilities and supplies furnished to the [Hospital] by the [Hospital] District are includable in the allowable cost of the [Hospital], at the cost of the [Hospital District], under applicable Medicare/Medicaid regulations." App. at 68. The Hospital District is identified as "a body politic and corporate and a governmental agency of the State of Texas" created under the enabling Act. App. at 67.

4. Contract terms demonstrate the Hospital District and Hospital purposefully **interrelate** and commit to each other long-term. The Hospital agrees to the terms of the Bond Indenture, including that no taxes will be used to pay the Bonds. The lease and related income from the lease portion of the contract is the sole source of paying the Bonds. App. at 58. The parties represent that leasing the new facility to the Hospital "will best serve the public interest and will further the purposes of the [enabling] Act including . . . an adequate hospital system . . . and the *provision of hospital care to the needy inhabitants* of the

District." App. at 67 (emphasis added). The Hospital represents it has "full corporate power and authority" to execute and fulfill "the Needy Care Agreement" and that it will operate the New Hospital "in a manner consistent with the public purposes intended to be promoted by the Act" creating the Hospital District. The parties contract that they must jointly agree to change orders or amendments to the Construction Contract for the New Hospital. At the written request of the Hospital for specified purposes permitted under the enabling Act, the Hospital District agrees to use "best efforts" to issue and sell "Additional Bonds" to meet certain Hospital special needs. The lease term is the greater of 31 years from the Series A Bonds issue date and the latest Bond maturity date, with a maximum primary term of 40 years from July 1, 1977. The Hospital has the option to extend the lease for an additional 25 years, in periods "of one year each." The Hospital contracts for 20 years after construction to comply with Federal requirements for Hill-Burton funds and "operate the New Hospital as a non-profit hospital within the meaning of title 42, Section 291(i) of the United States Code Annotated as then amended." The Basic Rent is set by formulas based on amounts due from outstanding Bond commitments. The Hospital agrees "notwithstanding anything to the contrary" in the contract to "pay Basic Rent at such times and in such amounts as to assure that no default" occurs in payment of the Bonds. When all the Bonds have been retired, the Hospital "shall not be further obligated to pay Basic Rent except to restore" certain trust fund losses that may have occurred. The Hospital expressly waives contractual and common law defenses to rent payment as to Basic Rent and its related

items, "it being the intention of the parties that, as long as any Bonds are outstanding, the obligation of the [Hospital] to pay the Basic Rent and such other payments shall continue to be payable in all events." The Hospital District makes some concessions to the Hospital for its first years of operation. Failure to maintain revenues and collect the set percentage of third-party pay obligations is an event of default, but not "during any fiscal year ending on or before December 31, 1983." Likewise, for the five years 1979 through 1983 the Hospital District agrees to pay certain Operating Expenses up to a maximum of $100,000 per year, which may be "out of Tax Funds."

5. The contract gives the Hospital District specific and general **control** provisions to require the Hospital to advance the Hospital District's statutory directives. First there is the sheer breadth of what the Hospital commits. The Hospital pledges virtually all property, real or personal, tangible or intangible, which it owns or thereafter acquires, to meet its obligations under the lease, including all its Gross Revenues, accounts receivable, "general intangibles or other rights or property," mineral interests in real property owned, leased or after acquired, machinery, fixtures, structures or "interests of any nature now owned or hereafter acquired." The contract particularly addresses the Hospital District's duty to pay the Bonds, and the failure to pay Basic Rent timely is a 5-day cure event of default. The Hospital "recognizes that many of the covenants," including without limitation "those in Sections 8.3 through 8.5 hereof" are intended "to assure

to the [Hospital] District that the New Hospital is operated in the manner contemplated by the Act." The Hospital specifically contracts to

> comply with the Act and endeavor to carry out the intent and purposes of the Act and, to that end, the Project shall be operated as contemplated by the Act for the reception, care and treatment of the members of the general public on a non-profit basis for the promotion of the health and well being of the citizens of the District and for the provision of hospital care to the District's needy inhabitants. App. at 53-54.

Violation of the covenants to fulfill the Hospital District's enabling Act are default events with 60-day cure provisions under the contract. As an additional item, "In order further to assure that the [Hospital] does not take any action inconsistent with such covenants [related to the Act]" the Hospital District has the right to have a representative "present at any meeting of the [Hospital Board] at which significant matters concerning the operation or policies of the [Hospital] are to be discussed." App. at 59. The Hospital agrees to give the Hospital District at least 45 days' notice before any change in basic room rates and fee for services schedules, with special notice for "a significant change in such rates, fees or charges" including "all existing pertinent information regarding the recommendations of a Hospital Consultant" under the contract terms or the Bond Indenture requirements, but the Hospital District is not required to "approve the rates." The Hospital must "submit a plan" to the Hospital District "for the management of the Hospital by administrative personnel directly responsible to it," which is "prepared in consultation with a Hospital Consultant" who certifies

the plan is "workable, financially sound and" meets standards for similarly-situated hospitals. The Hospital District must give "prior written approval" before the Hospital "may implement such a plan" for the New Hospital. The Hospital must maintain its corporate existence and may not allow any successor or merged non-profit corporation to exercise its obligations without certification "from each nationally recognized bond rating agency . . . for the Bonds" "that such merger or consolidation will not result in the Bonds being downgraded." To "facilitate the preparation of annual budgets" the Hospital agrees to adopt the same fiscal year as the Hospital District. Further, the Hospital warrants it has no intention to operate any health care facility "that might in any way be deemed competitive to the New Hospital," and covenants not to compete directly or indirectly in any manner in Walker or the two adjacent counties "during the term of its management agreement and for at least five (5) years thereafter."

6. Both the enabling statute for the lease of the Hospital District's facilities to the Hospital and the lease itself require the Hospital to fulfill the public policy purposes for which the Hospital District was created. App. at 66. Those purposes include serving indigent, Medicare and Medicaid patients who reside in the county, regardless of ability to pay. Dr. Cole's perception was that the Hospital failed to meet these public policies because it sought to discharge or move public assistance patients too quickly. He criticized the Hospital for what he perceived as its failure to meet its public purpose. Dr. Cole was in a particularly good position to know and evaluate

the Hospital's practices toward such patients. His practice included substantial numbers of elderly and publicly-assisted patients. Although Dr. Cole was only one of thirty-one physicians with privileges there, 24% of the Hospital's Medicare patients were his.

7. The practice of discharging or transferring out unprofitable publicly-assisted patients has the colloquial name in medical circles of "dumping." Applicable law requires investigation of a formal allegation of dumping. Dr. Cole filed a complaint against the Hospital alleging it dumped one of his patients. He caused a full administrative hearing against the Hospital, which ultimately was resolved in the Hospital's favor.

8. The Hospital's Executive Committee had a different perspective about Dr. Cole's Medicare patients. They complained that Dr. Cole was not discharging them fast enough, and that his failures in this regard cost the Hospital over one million dollars in "lost" Medicare reimbursement, because of his inefficiencies. The Executive Board and Dr. Cole clearly held differing views about what policies and practices were proper to carry out the Hospital's inherited Hospital District duties to serve the public. Although the Texas Department of Health ultimately concluded the Hospital had not violated the anti-dumping statute, the summary judgment evidence shows that Dr. Cole exercised his right of political speech to complain about their policies.

9. The Hospital's administrative proceedings to terminate Dr. Cole's privileges occurred in 1989 and 1990. In 1989 Petitioners filed a separate suit against twelve physicians, two corporations, and three other individuals

related to attempts to deny Dr. Cole's privileges at the Hospital and another facility. App. at 40. The defendant physicians included the members of the Executive Committee who recommended terminating Dr. Cole's privileges. After the administrative proceedings were complete, the district court consolidated the two suits. App. at 46.

10. Petitioners' active amended pleading in the suit against the Hospital alleged retaliation for Dr. Cole's exercising his Free Speech and political speech rights under the First Amendment as part of his 42 U.S.C. § 1983 claims. App. at 39. Petitioners also alleged numerous deficiencies in the administrative hearing process as denials of his due process rights as part of his 42 U.S.C. § 1983 claims. App. at 50. In their related pleading against the other defendants from the consolidated suit, Petitioners alleged specific votes against the financial interest of members of the Hospital Executive Committee during his service as an elected Manager of the Hospital District Board, and that he "has thus been subjected to intentionally malicious and unlawful acts in retaliation measure for voting the way he feels most appropriate for the citizens of Walker County." App. at 42. Petitioners alleged "that the efforts to remove him from the Huntsville Memorial Hospital Medical staff are motivated largely by personal malice of certain present and former members of the Executive Committee of the Medical Staff, by a desire to retaliate against Plaintiff Cole for his past and present political activities as a member of the Walker County Hospital District Board." App. at 43. Petitioners further alleged that

> [Dr.] Cole has a legal right to free speech. Plaintiff Cole exercised that right of free speech in criticizing HMH [the Hospital]. . . . The Defendants' actions were . . . in willful violation of Plaintiff Cole's . . . right to hold political office. . . . App. at 44, 45.

11. Defendant Hospital filed a motion for summary judgment. Under Texas law, to prevail the defendant moving for summary judgment must disprove at least one element of each cause of action that may be supported by the facts alleged. The Hospital's motion alleged there was no state action for any of the § 1983 allegations, but made alternative arguments only for Petitioners' due process claims, not the free speech claims. The affidavit of the Hospital's manager generally claimed that the Hospital District had not been involved in the specific decision to terminate Dr. Cole's privileges. In paragraphs 11 and 14 the affidavit states:

> The District did not play any role in the denial of Dr. Cole's reapplication for medical staff privileges at the Hospital. * * * To the best of my knowledge, information, and belief, the decision to deny Dr. Cole's reapplication was never reviewed, approved, accepted or even presented to the Walker County Hospital District.

In their response opposing the motion, Petitioners pointed out that the Hospital's motion failed to address all their causes of action. App. at 49.

12. The trial court granted the Hospital's motion for summary judgment. The Order expressly recites that "the decision by [the Hospital] not to renew the medical staff privileges of [Dr. Cole] was state action for the purposes

of Dr. Cole's claim under § 1983." App. at 70. The court concluded that Dr. Cole was afforded due process and rendered summary judgment on that ground, without consideration of his free speech claims. The court subsequently dismissed Petitioners' claims against all other defendants as a sanction for discovery abuse.

13. Petitioners appealed the summary judgment to the Texas Court of Appeals, First District. They alleged, among other matters, that the trial court erred because it failed to address the free speech cause of action under § 1983. The Court of Appeals acknowledged the First Amendment cause of action, but held there was no state action for any § 1983 cause of action. Petitioners appealed to the Supreme Court of Texas, which denied review and overruled motion for rehearing.

14. The published and only stated reason for sustaining the summary judgment against Petitioners is the Texas Court of Appeals' holding that there was no state action. App. at 11.

STATEMENT OF PRESERVATION

The federal question presented here has been properly preserved. Petitioners first raised the issue in their trial court pleadings. App. at 37-45. Following summary judgment, the First Amendment issue was presented to the Texas Court of Appeals which ignored all First Amendment allegations in finding no state action. App. at 4-11. The issue was again raised in the Application for Writ of Error to the Texas Supreme Court. App. 72-76.

That Court declined to exercise its discretionary jurisdiction and overruled Petitioners' motion for rehearing on October 18, 1996. App. at 32.

REASONS FOR GRANTING THE WRIT

Petitioners submit that the potential chilling effect on First Amendment political speech is at least as compelling as an allegation of discrimination. Especially in light of *Umbehr*, this Court should grant writ of certiorari to review whether the standard for state action under Section 1983 should require deference to the First Amendment and a balancing test similar to the one adopted for retaliatory non-renewal in independent contractor cases.

In *Umbehr* this Court held that the independent contractor relationship was sufficient to raise First Amendment Free Speech rights because of retaliation for the exercise of political speech. The interests Dr. Cole seeks to protect here are very similar. Umbehr alleged retaliation by failure to renew his independent contract to provide solid waste disposal services, which state law obligated the county to provide. Dr. Cole alleges retaliation by failure to renew his medical staff privileges at the hospital that state law requires the Hospital District to provide.

Umbehr was an outspoken critic of the County Board's policies and practices. Dr. Cole was an outspoken critic of the Hospital Board's policies. Umbehr ran unsuccessfully for the County Board; Dr. Cole and two members of his political slate ran successfully for the Hospital District Board, the political subdivision which exercised control and power over the Hospital and its practices.

Umbehr successfully pursued a claim against the County Board for violation of the state Open Meetings Act. Dr. Cole filed a Medicare "dumping" complaint against the Hospital, which was pursued to a final administrative determination against his claim. The County Board voted for non-renewal of Umbehr's independent contract, whereas the Hospital Executive Committee recommended and ultimately the Hospital Board voted to terminate Dr. Cole's Hospital staff privileges.

In *Umbehr* the issue was whether Umbehr's independent contractor status did not entitle him to First Amendment protection against retaliation. The issue here is whether as a physician with staff privileges, Dr. Cole is entitled to First Amendment protection in the state action analysis of the control exercised by the Hospital District Board over the Hospital and the symbiotic relationship which existed between the Hospital and the Hospital District Board, the applicable elective public body to protect the public interest.

The present case does involve the relationship between the Hospital District, charged with providing a hospital for county residents, and the charitable corporation formed to carry out this public purpose. Although this state action question – adding a nonprofit corporate layer between the elected board and the public purpose it is to serve – appears to add another formal distinction between Dr. Cole's position and Umbehr's, the analogies to the *Umbehr* case do not end here. Indeed, this Court's *Umbehr* opinion makes clear that the distinctions are formal ones, not substantive ones.

The physician staff privilege relationship, like the independent contractor status in *Umbehr*, is a "relationship [which] provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government 'are often in the best position to know what ails the agencies for which they work.' " *Umbehr*, ___ U.S. at ___, 116 S.Ct. at 2348, quoting *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686, 698 (1994). (Plurality Opinion). The efforts of the Hospital Executive Committee to make Dr. Cole conform to its preferred treatment policy for Medicare patients at the Hospital creates the same type of deterrent or "chilling" effect on public policy debate that "fall short of a direct prohibition against the exercise of First Amendment rights" but are nevertheless condemned in *Umbehr*, ___ U.S. at ___, 116 S.Ct. at 2347; quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The same standard of protection from burdensome litigation should apply – determination of the fact whether the act was not done in retaliation for protected First Amendment activity. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), cited in *Umbehr*, ___ U.S. at ___, 116 S.Ct. at 2348. In analogy to the "brightline" approach this Court rejected in *Umbehr* for the employee-independent contractor distinction, allowing a state action line to be drawn for a layer of delegation of the public purpose to a nonprofit corporation in a symbiotic relationship with the Hospital District would create opportunities for manipulation and abuse by the government. *See Umbehr*, ___ U.S. at ___, 116 S.Ct. at 2349. ("Determining constitutional claims on the basis of such formal distinctions which can

be manipulated largely at the will of the government agencies concerned.").

This Court has previously granted certiorari on a question involving what constitutes the state action nexus for purposes of free speech rights. In *Lebron v. National Railroad Passenger Corp.*, ___ U.S.___, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), this Court held that for purposes of First Amendment political free speech, Amtrak is the government. The opinion emphasizes the importance of First Amendment considerations in evaluating what constitutes government action. This Court observed that although Congress may declare certain government entities "not government" for some purposes, it may not use that mechanism to defeat Free Speech rights. Petitioners submit that First Amendment rights are special, requiring a more deferent analysis in finding state action through the formal layers the government erects. Though the Hospital District is the acknowledged governmental unit, created by the Texas Legislature, the limitations placed on the Hospital by its contract with the Hospital District make it, as a practical matter, the actor exercising the public policy expressed in the statute creating the Hospital District. The contract repeatedly recites that the Hospital will uphold these public purposes. Contractual limitations, as a practical matter, prevent the Hospital from doing anything but running the county hospital for which the Hospital District was created. Although the contractual layer obfuscates the relationship, the Hospital should nevertheless be treated as state government for Free Speech purposes of criticizing the policies affecting

patients. As this Court wrote, "it cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form . . . ." *Lebron, Id.* at ___, 115 S.Ct. at 972. Petitioners respectfully submit that the First Amendment considerations require this analysis. Adding a corporate layer through which the Hospital District fulfills its statutory purpose, like Congress' creation of a public corporation stated not to be government, should likewise be unavailing in this case.

The Texas Court of Appeals based its determination that there was no "state action" on the absence of any claim for "discrimination" based on race, creed or other suspect classification. Petitioners submit that this analysis was error, because First Amendment considerations similarly require deferential scrutiny. First Amendment rights, as this Court wrote in *Lebron*, are among "the most solemn obligations imposed in the Constitution," just as an allegation of discrimination would be. *Id.*, 115 S.Ct. at 972.

The Texas court based its conclusion on a fact-based analysis for similar cases, choosing to ignore the First Amendment claims in favor of cases in which "the defendants were nonprofit corporations that leased hospital facilities from the county and were responsible for their own daily operations." App. at 6. The Texas court therefore looked to *Albright v. Longview Police Dept.*, 884 F.2d 835 (5th Cir. 1989); *Jatoi v. Hurst-Euless-Bedford Hospital Auth.*, 807 F.2d 1214 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988); and *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975).

In its opinion the court concedes that there was a direct connection or "nexus" between the Hospital and the Hospital District's decision to terminate Dr. Cole's privileges – the repayment of the Hospital District's bonds through the rent, and Dr. Cole's alleged negative impact on the Hospital's income through his "mishandling" of Medicare patients. Given Dr. Cole's criticism of the Hospital's policies toward Medicare and other public-assistance patients, this connection applies all the more so to Petitioners' assertion of Dr. Cole's First Amendment rights. The Texas Court of Appeals explained the clearly established connection in these words: "the [Hospital] District relies on the Hospital to pay rent, which the District uses to repay bonds, and one ground for terminating Dr. Cole was his negative financial impact on the Hospital." App. at 9.

This Court found such a bond repayment connection to be the significant factor in its holding that there was state action in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The apparent distinction by the Texas court is that *Burton* involved an allegation of racial discrimination. The Texas Court of Appeals wrote emphasizing that distinction:

> First, the Hospital was not accused of racial discrimination. this fact is significant because courts, following constitutional and legislative mandates, have construed the state action concept broadly when the goal was to cure racial discrimination, as it was in *Jatoi. Greco*, 513 F.2d at 879. They have construed the concept of state action more narrowly when, as in this case, there was no claim of racial discrimination. *Id.*

App. at 10. Petitioners submit that the Free Speech right under the First Amendment, as one of the most fundamental and basic rights guaranteed by our Constitution, likewise requires the same deferential inquiry into what constitutes state action, consistent with this Court's writing in *Lebron*.

The Federal Courts of Appeal have not been consistent in distinguishing, analyzing or applying *Burton*. For example, the Ninth Circuit wrote, in *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231-32 (9th Cir. 1996), that what distinguishes *Burton* is the close geographic and symbolic relationship:

> That case involved a close geographic and symbolic relationship between government and private actors, and the holding was apparently limited to the lessee/lessor relationship. *Id.* at 726, 81 S.Ct. at 862 ("Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown . . . here, the proscriptions of the Fourteenth Amendment must be complied with."). No facts have been alleged which could support a claim that George's termination was geographically or symbolically linked to the government.

Under the Ninth Circuit's analysis, since a lease of the physical facilities is involved and Dr. Cole produced evidence that his denial of privileges was geographically linked to the government-owned hospital and symbolically related to the Hospital District, Petitioners should have their case heard.

In contrast the First Circuit describes the *Burton* holding as one of "a symbiotic relationship" for which "one of the key factors . . . is certainly whether the state shared in any profits made," although absence of a "financial partnership" does not necessarily preclude finding a symbiotic relationship. *Barrios-Velazquez v. Asociacion de Empleados Del Estado Libre Asociado De Puerto Rico*, 84 F.3d 487, 494 (1st Cir. 1996) (quoting, in part, *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 98-99 (1st Cir. 1990)). Here, terminating Dr. Cole's privileges is directly related both to the financial success of the Hospital's enterprise to repay the Hospital District's bonds, and to silencing Dr. Cole's political views of the proper extent of care for Medicare and other publicly-assisted patients. Although the First Circuit states the *Burton* rationale differently, presumably it too would find state action with respect to the Hospital's termination of privileges.

The issue of delegating the government's obligation is also raised. Under *West v. Atkins*, 487 U.S. 42, 55, 108 S.Ct. 2250, 2258, 101 L.Ed.2d 40 (1988), a physician, even though an independent contractor, who was fulfilling the state's Eighth Amendment obligation to provide health care to prisoners, acted under authority of state law. The state has an equal constitutional duty not to chill political speech with respect to the policies and practices of the Hospital to fulfill the public purposes of the Hospital District. Termination of Dr. Cole's privileges relates directly to this First Amendment obligation. One court has reconciled the tension between *West v. Atkins* and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), by concluding that the state's independent contractor is "a state actor within the meaning of

§ 1983 with respect to the services so provided" because of the constitutional duty to provide services, but "the contractor [is not] a state actor with respect to its employment decisions." *Sherlock v. Montefiore Medical Center*, 84 F.3d 522, 527 (2d Cir. 1996). Petitioners submit that, under this analysis, because the state owes the First Amendment duty to Dr. Cole, this Court and the Second Circuit should find state action for purposes of Section 1983.

The Texas Court of Appeals followed the practice of categorizing the fact-based inquiry of whether there is state action. Petitioners submit that the court erred in not including the First Amendment facts of retaliation for exercise of political speech in the factual classification. *See, e.g., Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992).

The basic methodology for many courts in analyzing whether there is state action has been to look to some four or five categories of "fact-based classifications" deduced from this Court's opinions. After this Court's *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) opinion, a number of commentators have questioned whether this Court has departed from prior "state action" methodology holding that the action of the State had to be involved in the very conduct at issue. *See, e.g., Groman v. Township of Manalapan*, 47 F.3d 628, 639 nn. 16 & 17 (3d Cir. 1995). In other words, the State was involved in the jury selection process as part of the litigation mechanism provided by the State to meet due process requirements, but the discriminatory peremptory jury strikes occurred by the attorneys representing litigants not necessarily connected to the State. One meaningful distinction is that the right to jury trial is so basic, so fundamental to our basic rights that its

protection lessens the threshold for "state action" under the Fourteenth Amendment and Section 1983. The same reasoning should apply here, because the threat of retaliatory revocation of privileges for political speech also threatens a fundamental right going to the very heart of our constitutional system.

Petitioners do not suggest whether their case should be in a different fact-based category because of its First Amendment implications, or whether the threshold for state action is different for the most basic fundamental rights, or even whether there is more appropriate analytical approach. Petitioners do suggest that this Court should provide guidance to the Texas Court of Appeals and other lower courts that the First Amendment considerations require a conclusion of state action, whatever the theoretical framework.

It is for this Court to declare whether the free speech factors are part of the fact classification, or whether a different methodology is appropriate. In *Lebron* this Court acknowledged that its "cases deciding when private action might be deemed that of the state have not been a model of consistency." *Lebron*, ___ U.S. at ___, 115 S.Ct. at 964. The Court should clarify how fundamental First Amendment political speech interests affect the evaluation of what constitutes state action by "private" nonprofit lessees from the government.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Thomas C. COLE, Jr., M.D., Thomas C. Cole, Jr., M.D. P.A., and Dorothy Cole, Appellants,

v.

HUNTSVILLE MEMORIAL HOSPITAL, Ralph E. Beaty, William L. Nix, M.D., UCA Management Company, Methodist Retirement Services, Inc., Joe Helms, Chester Freeman, Jr., David Knuth, M.D., Nathan W. Colwell, M.D., Michael C. Deberardinis, M.D., James M. Hanna, M.D., Robert L. Hart, M.D., R. Carl Mahaffey, M.D., J. Stan Hines, M.D., Susan E. Nelson, M.D., Howell Towler, M.D., Paul Vilardi, M.D., and Lawrence H. Wells, M.D., Appellees.

No. 01-93-00085-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

Feb. 15, 1996.

OPINION

COHEN, Justice.

Appellants, Dr. Cole, his professional association, and his wife, Dorothy Cole (collectively, the Coles), appeal from a take-nothing judgment. The Coles contend the trial court erred by granting summary judgment in favor of Huntsville Memorial Hospital (the Hospital) and by striking their pleadings against the remaining appellees. We affirm.

Facts

In 1987, the Hospital's executive committee recommended to the board of trustees that Dr. Cole's medical staff privileges be denied. After the Hospital notified Cole of its recommendation, Cole demanded that the recommendation be withdrawn and requested a hearing. Cole then filed this lawsuit against the Hospital. Cole sought an injunction, claimed the Hospital violated his right to due process, and sought damages under the Texas Medical Practice Act, TEX.REV.CIV.STAT.ANN. art. 4495b (Vernon Pamph.1996), and the Hospital Licensing Act, TEX.HEALTH & SAFETY CODE ANN. § 241.101(c) (Vernon Supp.1996). The parties agreed that the Hospital would consider Cole's request for privileges for 1988, and Cole remained on the Hospital's staff.

The executive committee recommended against Cole's reappointment for 1988. In a mandamus proceeding, the court of appeals abated the lawsuit until Cole exhausted his administrative remedies. *See Huntsville Mem. Hosp. v. Ernst*, 763 S.W.2d 856 (Tex.App. – Houston [14th Dist.] 1988, orig. proceeding). During this time, Cole remained on the Hospital's staff.

In 1989, the executive committee again recommended that Cole's reapplication for staff privileges for 1990 be denied. The Hospital notified Cole of the committee's decision and his right to a hearing. The committee provided Cole with a statement of grounds for denying his reappointment: (1) his continued pattern of inappropriate and unprofessional conduct; (2) his continued pattern of inappropriate use of inpatient, diagnostic, and ancillary services; (3) ongoing concerns about his clinical judgment

and competence; and (4) the adverse financial impact on the Hospital caused by his patient care management and failure to abide by Hospital peer review recommendations.

Cole requested a hearing, After one postponement at Cole's request, a three-day hearing was held on March 28-30, 1990. The hearing panel unanimously upheld the recommendation of the executive committee. Cole requested appellate review of the panel's decision. The appellate review panel unanimously recommended that the decision of the hearing panel be upheld. On June 28, 1990, the board of trustees voted not to renew Cole's medical staff privileges. Cole then reasserted his original claims against the Hospital.

In 1989, the Coles sued twelve physicians, two corporations, and three other individuals (collectively, the Doctors). This second suit, which was consolidated, related to attempts to deny Cole's privileges at the Hospital and at Community Methodist Retirement Home. The Coles claimed damages for libel, slander, tortious interference, and antitrust violations.

The trial court granted the Hospital's summary judgment. At a later hearing to enforce sanctions for discovery abuse, the trial court struck the Coles' pleadings against the Doctors and entered final judgment.

The Summary Judgment

In point of error two, Cole contends that the trial court erred by granting the Hospital's motion for summary judgment. He asserts that (1) fact issues exist as to

whether the Hospital violated his due process rights, (2) the motion for summary judgment did not address his due process cause of action under the Texas Constitution, (3) the motion for summary judgment did not address his first amendment cause of action, and (4) the trial court erred in finding no private cause of action exists under the Texas Medical Practice Act and the Hospital Licensing Act.

Summary Judgment Standard of Review

Summary judgment is proper only when a movant establishes that no genuine issue of material fact exists, thereby entitling the movant to judgment as a matter of law. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991). A defendant is entitled to summary judgment if the evidence disproves as a matter of law at least one element of each of the plaintiff's causes of action. *Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex.App. – Houston [1st Dist.] 1993, writ denied). In reviewing the summary judgment, we must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in its favor. *Id.*

Objections to Summary Judgment Evidence

The Hospital objected to Cole's summary judgment evidence, two affidavits, and now reasserts its objections. The Hospital did not secure a ruling on its objections; therefore, nothing is preserved for review. *Fox Elec. Co. v. Tone Guard Sec., Inc.*, 861 S.W.2d 79, 81 (Tex.App. – Fort Worth 1993, no writ).

Is the Hospital's Action "State Action" under the Fourteenth Amendment and 42 U.S.C. § 1983?

In its cross-point, the Hospital contends that the trial court properly granted summary judgment but incorrectly ruled that the Hospital is a state hospital and therefore subject to 42 U.S.C. § 1983 and the fourteenth amendment. Because the issue was considered and decided by the trial court and is dispositive of several claims, we consider it first. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380-82 (Tex.1993).

The due process clause of the fourteenth amendment does not apply to private conduct. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). Similarly, under 42 U.S.C. § 1983 (1988), the defendant must have acted under color of state law. *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir.1989); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex.App. – Amarillo 1993, writ denied). If a defendant's conduct constitutes state action under the fourteenth amendment, it is also state action under section 1983. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769-70, 73 L.Ed.2d 418 (1982); *Mitchell*, 855 S.W.2d at 864. Thus, the issue is whether the Hospital's act is "fairly attributable to the State." *Kohn*, 457 U.S. at 838, 102 S.Ct. at 2770. If not, the Coles have no claim under section 1983 or the United States Constitution.

A private entity may be deemed a state actor when it performs a function that is traditionally the State's exclusive province. *Wong*, 881 F.2d at 202. Obviously, operating a hospital is not such a function. Alternatively, state action may be found where there is a nexus between the

state and the private defendant that makes the action fairly attributable to the state. *Id.* The purpose of the nexus requirement is "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982).

Several Fifth Circuit cases have discussed whether a hospital's actions could be attributed to the state. *Albright v. Longview Police Dept.,* 884 F.2d 835, 841 (5th Cir.1989); *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.,* 807 F.2d 1214, 1220-22 (5th Cir.1987), *cert. denied,* 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988); *Greco v. Orange Memorial Hosp. Corp.,* 513 F.2d 873, 877, (5th Cir.), *cert. denied,* 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975). In each, the defendants were nonprofit corporations that leased hospital facilities from the county and were responsible for their own daily operation. *Id.* at 876.

In *Greco,* the Fifth Circuit considered six factors in concluding that there was no state action. First, the claims against the hospital did not involve racial discrimination. 513 F.2d at 879. Second, financial support was given to the hospital by the county in the form of a nominal, one-dollar-per-year rent charge. *Id.* at 880. Third, the hospital was ultimately responsible for the operation of the facility under its lease with the county. *Id.* Fourth, there was no showing of any benefits conferred on the county directly attributable to the objectionable activity. *Id.* Fifth, there was no nexus between the county's involvement with the hospital and the disputed action. *Id.* Sixth, the county had no power to change the hospital's decision

nor did it directly or indirectly participate in the formulation of the disputed policy. *Id.* at 881. In *Albright*, the court used these same factors in deciding that no state action existed. 884 F.2d at 841.

By contrast, in *Jatoi*, the Fifth Circuit found a nexus between the hospital authority and the private manager's decision to terminate a doctor's staff privileges that was close enough to justify a finding of state action. 807 F.2d at 1221-22. *Jatoi* is distinguishable from *Albright* and *Greco*. First, in *Jatoi*, the repayment of the bonds used to build the hospital was directly linked to and entirely dependent on the successful operation of the hospital. 807 F.2d at 1221. Thus, a financially interdependent relationship existed between the hospital and the hospital authority. *Id.* Second, Jatoi involved national origin and alienage discrimination. *Id.* Third, although the hospital authority had no direct daily input into the operation of the hospital, it was informed of decisions, including the decision to terminate Dr. Jatoi's privileges, and it monitored the lessee's activity and retained the ability to prevent or control racial discrimination by its private manager. *Id.* at 1221-22. Fourth, the hospital authority was a specially-created government entity that existed for the purpose of overseeing the hospital's activities; no such functional intermediary was present between the hospital and the county in either *Albright* and *Greco*. 884 F.2d at 840.

Guided by this authority, we must now "sift the facts and weigh the circumstances" here to determine whether the Hospital's termination of Cole involved state action. *Weaver v. AIDS Serv. of Austin, Inc.*, 835 S.W.2d 798, 801 (Tex.App. – Austin 1992, writ denied) (citing *Burton v.*

Wilmington Parking Auth., 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961)).

The Walker County Hospital District was created in 1971. Thus, the District, a specially-created governmental entity, is the functional intermediary between the county and the Hospital. *Albright*, 884 F.2d at 840. The statute was amended in 1977 to provide:

> The District, through its Board, is further authorized to enter into an operating or management contract with any person regarding all or any of its hospitals . . . and it may delegate to the manager the power to manage and operate such hospital . . . and to employ and discharge employees or appoint and remove doctors from the staff. . . .

Act of May 20, 1977, 65th Leg., R.S., ch. 527, § 1(d), 1977 Tex.Gen.Laws 1325, 1327.

Under this authority, the District entered a lease agreement with the Hospital, which is a nonprofit corporation. The Hospital is governed by its board of trustees selected under the Hospital's bylaws. Ralph Beaty, the Hospital's administrator, swore that the District did not enact or adopt the Hospital's bylaws or any of its policies and procedures.

The District owns the land and the building that house the Hospital, and the Hospital pays rent to the District. The Hospital's rent, paid from patient revenue, repays the District's bonds. Thus, the District derives a direct financial benefit from the Hospital because the repayment of its bonds depends on the successful operation of the Hospital. One of the grounds for terminating

Cole was that his use of the facilities had a negative financial impact on the Hospital. That negative financial impact could affect the repayment of the District's bonds. The District and the Hospital are intertwined in a financially interdependent relationship. *Albright*, 884 F.2d at 840.

Evidence established that the District was not informed of the Hospital's decisions regarding its medical staff; that the District played no role in denying Cole's privileges; and that the Hospital did not inform the District of its June 28, 1990 decision to deny Cole's reappointment. However, the lease provides:

> The [Hospital] also recognizes that many of the covenants contained in this Lease . . . are designed to assure to the District that the New Hospital is operated in the manner contemplated by the Act. In order further to assure that the [Hospital] does not take any action inconsistent with such covenants, if it so desires, the District shall be entitled to have a representative of the District present at any meeting of the Board of Trustees of the [Hospital] at which significant matters concerning the operation or policies of the [Hospital] are to be discussed.

Beaty's affidavit states that while the lease authorizes the District to have a representative present at meetings of the board, the District's representative is not authorized to participate in choosing or retaining the Hospital's medical staff, such as Dr. Cole.

Under the lease, the Hospital is responsible for its daily operation. The lease obligates the Hospital to operate in an economical and efficient manner in line with

standards generally acceptable for fully accredited hospitals. Evidence established that the district does not participate or have the right to participate in any way with the daily operation of the Hospital. However, the District retained some authority over the Hospital's management. Section 8.11 of the lease required the Hospital to submit a management plan for the District's approval, but no one contends the plan affects Dr. Cole's privileges.

We conclude that all but one of the *Greco* factors indicate that there was no state action. First, the Hospital was not accused of racial discrimination. This fact is significant because courts, following constitutional and legislative mandates, have construed the state action concept broadly when the goal was to cure racial discrimination, as it was in *Jatoi*. *Greco*, 513 F.2d at 879. They have construed the concept of state action more narrowly when, as in this case, there was no claim of racial discrimination. *Id.*

Second, there is no evidence that the Hospital paid only $1 a year in rent as in *Greco*, but whether the hospital pays a large or small amount of rent will not alone establish the required interrelationship. *Albright*, 884 F.2d at 841. Third, as in *Greco*, the Hospital, not the District, was ultimately responsible for the daily maintenance and operation of the facility. Fourth, as in *Greco*, there is no benefit to the District directly attributable to Dr. Cole's removal. The fifth factor in *Greco* is present, a nexus between the District's involvement with the Hospital and Dr. Cole's removal. As stated, the District relies on the Hospital to pay rent, which the District uses to repay bonds, and one ground for terminating Dr. Cole was his negative financial impact on the Hospital.

We consider the sixth factor in *Greco* to be especially important. Here, the District had no power to change the Hospital's decision nor did it directly or indirectly participate in the decision to remove Dr. Cole. The same fact was declared to be "particularly poignant" in *Albright*, and led to the conclusion that there was no state action. 884 F.2d at 840.

We conclude that the court erred in determining that the Hospital's acts constituted state action. "[C]onstitutional standards are to be invoked only when it can be said that the State is *responsible* for the *specific conduct* of which the plaintiff complains." *Blum*, 457 U.S. at 1004, 102 S.Ct. at 2786 (second emphasis added). That is not the case here. Because there was no state action, appellants cannot prevail on their constitutional causes of action or their claim under 42 U.S.C. § 1983.

We sustain the Hospital's cross-point of error.

Private statutory cause of action

Cole contends that the trial court erred in finding that a private cause of action does not exist under either the Texas Medical Practice Act, TEX.REV.CIV.STAT.ANN. art. 4495b (Vernon Pamph.1996), or the Hospital Licensing Act, TEX.HEALTH & SAFETY CODE ANN. § 241.101 (Vernon 1992 & Vernon Supp.1996).

A. The Hospital Licensing Act

Generally, the Hospital Licensing Act governs the issuance of licenses to hospitals and authorizes the Texas Board of Health to adopt rules and minimum standards

relating to staffing of hospitals, patient care and transfers, and safety and sanitation. TEX.HEALTH & SAFETY CODE ANN. §§ 241.022-028 (Vernon 1992 & Vernon Supp.1996).

Cole asserts a private cause of action exists under section 241.101 of the Act. This section relates to hospital staffing, records, and plan reviews and is found after the Act's enforcement provisions. The section provides:

> (a) Except as otherwise provided by this section and Section 241.102, this chapter does not change the authority of the governing body of a hospital, as it considers necessary or advisable, to:
>
> (1) make rules, standards, or qualifications for medical staff membership; or
>
> (2) grant or refuse to grant membership on the medical staff.
>
> (b) This chapter does not prevent the governing body of a hospital from adopting reasonable rules and requirements in compliance with this chapter relating to:
>
> (1) qualifications for any category of medical staff appointments;
>
> (2) termination of appointments; or
>
> (3) the delineation or curtailment of clinical privileges of those who are appointed to the medical staff.
>
> *(c) The process for considering applications for medical staff membership and privileges must afford each applicant procedural due process.*
>
> (d) An applicant for medical staff membership or privileges may not be denied membership or

> privileges on any ground that is otherwise prohibited by law.

TEX.HEALTH & SAFETY CODE ANN. § 241.101 (emphasis added). Cole contends that section 241.101(c) affords him a separate due process cause of action.

Reviewing the enforcement provisions of the Act, we find the legislature, with limited exceptions, entrusted the enforcement of the Act to the Texas Board of Health and the Texas Department of Health. The Act authorizes the Department of Health to make any inspection or investigation necessary to assure compliance with or prevent a violation of the Act. TEX.HEALTH & SAFETY CODE ANN. § 241.051 (Vernon Supp.1996). The Department is authorized to deny, suspend, or revoke a hospital's license if it fails to comply with any provision of the Act or rule adopted. TEX.HEALTH & SAFETY CODE ANN. § 241.053 (Vernon Supp.1996). Moreover, the commissioner of health may issue emergency orders that the attorney general or the appropriate county or district attorney may enforce through a suit and injunctive relief. TEX.HEALTH & SAFETY CODE ANN. § 241.0531, 241.054 (Vernon 1992 & Vernon Supp.1996). Administrative penalties may be imposed by the Texas Board of Health and by the Commissioner of Health. TEX.HEALTH & SAFETY CODE ANN. §§ 241.058, 241.059 (Vernon Supp.1996). A person operating a hospital without a license is subject to criminal liability. TEX.HEALTH & SAFETY CODE ANN. §§ 241.057 (Vernon 1992). This statutory framework shows the legislature's intent to allow administrative agencies to enforce the provisions of chapter 241.

There is one exception under the enforcement provision of the statute: the legislature expressly provided a private cause of action under section 241.056, which allows persons injured by a hospital's patient transfer policy to sue. TEX.HEALTH & SAFETY CODE ANN. § 241.056 (Vernon 1992 & Vernon Supp.1996). If a statute refers to a person, thing, or consequence, it excludes all others. *Estate of Padilla v. Charter Oaks Fire Ins. Co.*, 843 S.W.2d 196, 199 (Tex.App. – Dallas 1992, writ denied). By expressly granting a private cause of action to one class of persons, the legislature evidenced its intent not to grant a private cause of action to other classes of persons, such as Cole.

Cole argues that we should imply a cause of action under chapter 241. We disagree. We must construe a statute to give effect to the legislative intent. *Harris County Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex.1991). When the legislature enacts a regulatory statute to protect a class of persons, it intends to create an enforcement scheme that will fully protect that class. *Litton Indus. Prod., Inc. v. Gammage*, 644 S.W.2d 170, 176 (Tex.App. – Houston [14th Dist.] 1982), *aff'd in part, rev'd in part on other grounds*, 668 S.W.2d 319 (Tex.1984). Therefore, when the enforcement scheme fails to adequately protect the intended beneficiaries, it is the duty of the courts to imply a cause of action to effectuate the legislative purposes. *Id.* We may impute an implication to a statute only when it is obvious that the legislature intended the implication and no other interpretation can be gathered from the statute as written; implications are never permitted if they will add to or contradict the statute. *Williams v. Anderson*, 850 S.W.2d 281, 284

(Tex.App. – Austin 1993, writ denied) (citing *Massachusetts v. United N. & S.D. Co.*, 140 Tex. 417, 168 S.W.2d 226, 229 (1942)).

The Department of Health is authorized to deny, suspend, or revoke a hospital's license if it fails to comply with *any* provision of the Act. TEX.HEALTH & SAFETY CODE ANN. § 241.053. We conclude that only the Department is authorized to redress complaints under section 241.101(c). Any other interpretation of the statute would add to its overall framework.

The trial court did not err in finding no separate cause of action under the Hospital Licensing Act.

B. The Texas Medical Practice Act

Generally, the Texas Medical Practice Act governs (1) the qualifications, powers, and duties of the Board of Medical Examiners, (2) the licensing of physicians, and (3) disciplinary actions by the board. TEX.REV.CIV.STAT. ANN. art. 4495b §§ 2.01-4.14 (Vernon Pamph.1996).

The provision of the Act relied on by Cole provides:

> The legislature makes the following declarations:
>
> . . . [H]ospitals, institutions, programs, and state agencies or political subdivisions shall, however, be free to adopt reasonable rules, regulations, and requirements relating to qualifications for medical staff appointments, reappointments, termination of appointments . . . so long as such rules, regulations and requirements are determined upon a reasonable

> basis, such as professional and ethical qualifications of the physician, upon standards that are reasonable, applied untainted by irrelevant considerations, supported by sufficient evidence, free of arbitrariness, capriciousness, or unreasonableness and do not differentiate solely upon the academic medical degree held by such physician.

TEX.REV.CIV.STAT.ANN. art. 4495b § 1.02(9).

Similar to the Hospital Licensing Act, the Medical Practice Act is enforced through criminal penalties and through administrative regulation. The Act defines unlawful and prohibited practices and provides criminal penalties for a person practicing medicine in violation of the Act. TEX.REV.CIV.STAT.ANN. art. 4495b, § 3.07 (Vernon Pamph.1996). The Act also defines the grounds for revocation and suspension of a license by the board, sets forth the charging and hearing process to be followed by the board, and lists the methods of discipline available to the board. TEX.REV.CIV.STAT.ANN. art. 4495b, §§ 4.01-4.12 (Vernon Pamph.1996). The Act also authorizes the attorney general to file an action to recover a civil penalty from a person in violation of the Act. TEX.REV.CIV.STAT. ANN. art. 4495b, § 4.126 (Vernon Pamph.1996).

Employing the same reasoning above, we find that the legislature did not intend a private cause of action under the Act. We find the trial court did not err by refusing to graft a private cause of action for Cole into the Act. *Williams*, 850 S.W.2d at 284.

Cole also relies on a section under the heading "reporting and confidentiality requirements" that provides:

> A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of a peer review as defined by this Act.

TEX.REV.CIV.STAT.ANN. art. 4495b § 5.06(1) (Vernon Pamph.1996). We find that this provision grants a qualified immunity from liability to a hospital and the members of its medical peer review committee and does not grant a cause of action to doctors, such as Cole, complaining of the actions of that committee. This section offers a hospital or committee members who did not act with malice protection from suit under other causes of action. For instance, this provision could be asserted to avoid liability for slander, libel, or any number of causes of action that might be asserted by a doctor claiming he was damaged by committee actions.

The trial court did not err in finding that the Medical Practice Act does not afford Cole a private cause of action.

We overrule point of error two.

The Doctors' Judgment

In point of error one, the Coles contend that the trial court erred in striking their pleadings against the other defendants (collectively, the Doctors) for discovery abuse.

On June 18, 1991, the Doctors served interrogatories on the Coles, and the Coles filed answers to the interrogatories. However, in October 1991, the Doctors filed a

motion to compel more complete interrogatory answers. There is no evidence that the motion was presented to the trial court for a ruling.

In December 1991, the Doctors filed motions to compel Cole to produce documents requested in a subpoena duces tecum that directed Cole to produce documents at his deposition. The Doctors contend the trial court orally ordered the Coles to produce requested documents; the Coles, however, dispute the order.

In March 1992, the Doctors filed motions to compel answers to interrogatories, answers to deposition questions, production of documents requested in Cole's deposition subpoena, production of documents on damages, designation of experts, and a deposition date for Mrs. Cole. The Doctors contend the trial court orally ordered the Coles to produce all responsive documents by March 23, 1992, or they would be excluded at trial. This oral order is referenced in the trial court's final dismissal order, and acknowledged by the Coles.

In June 1992, the Doctors filed a motion for oral hearing on all pending motions to compel answers to interrogatories and production of documents supporting those answers. On July 7, 1992, the trial court signed an order compelling the Coles to completely answer the interrogatories by August 1, 1992, or their pleadings would be stricken. The trial court also ordered the Coles to pay $250 in attorney's fees. There is no evidence in the record that the Coles complied with the order by paying the attorney's fees or by supplementing their interrogatory answers. In their brief, the Doctors assert the Coles did neither.

On September 2, 1992, the Doctors filed an unverified motion for sanctions and a motion to compel production of documents responsive to a subpoena duces tecum served on Cole's accountant and production of all other discovery requested. The motion contended that the Coles' accountant, Donald Booker, produced documents at his deposition on June 19, 1992 but that the Doctors did not receive copies of all the documents produced at the deposition. The motion asked the trial court to order production of all documents related to the claims in the lawsuit, including (1) financial information, (2) all documents produced at Booker's deposition and responsive to his subpoena, (3) all other documents responsive to discovery requests, and (4) all documents relating to legal expenses included in the Coles' damage calculation.

The Coles responded to the Doctors' motion to compel and for sanctions. Attached to their response is the affidavit of their accountant who averred that he produced all documents relating to the Coles at his deposition, that Nightrider Copy Service copied and returned the documents, but that Lawyers Filing Service removed a large box of documents that had not been returned. Also attached to the response is the affidavit of the Coles' attorney, who stated that at the deposition he never saw a document that the Doctors contend was produced but not copied. Neither affidavit addresses the other complaints in the motion to compel.

On September 4, 1992, the trial court granted the Doctors' motion to compel and ordered the Coles to produce all documents "in any way related to the claims made in this suit including all financial and accounting

records, all checks, bills, invoices, statements, notes, correspondence, etc., pertaining to the legal fees incurred on behalf of Plaintiffs in the matter and any other documents relevant to the issues before this Court." The order directed the Coles to produce the documents within 10 days from the date of the order or suffer dismissal of their causes of action.

On September 17, 1992, the Doctors filed a motion to enforce the dismissal sanction. Attached to the motion is the affidavit of the Doctors' attorney and excerpts from the accountant's deposition. On September 25, 1992, the Coles filed a motion for protective order asking the court to direct the Doctors to withdraw their request for medical and billing records or to provide an advance deposit to cover the cost of copying and redacting the documents. The trial court denied the motion.

On October 2, 1992, the trial court granted the Doctors' motion to enforce sanctions. The order struck the Coles' pleadings and dismissed the cause with prejudice. The trial court later denied the Coles' motion for new trial.

As long as sanctions imposed for failure to comply with discovery are within the authority vested in the trial court, they will not be overturned unless they constitute a clear abuse of discretion. *Seckers v. Ocean Chem., Inc.*, 845 S.W.2d 317, 318 (Tex.App. – Houston [1st Dist.] 1992, no writ). The trial court's discretion in this area is broad. *Lawson v. Muckley*, 827 S.W.2d 484, 486 (Tex.App. – Houston [1st Dist.] 1992, writ denied). To establish a clear abuse of discretion, a party must show that the trial

court's action was arbitrary or unreasonable in light of all the circumstances of the case. *Id.*

An imposition of sanctions for discovery abuse under TEX.R.CIV.P. 215 must be "just." *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex.1991); *Berry-Parks Rental Equip. Co. v. Sinsheimer,* 842 S.W.2d 754, 757 (Tex.App. – Houston [1st Dist.] 1992, no writ); *Bair v. Hagans,* 838 S.W.2d 677, 680 (Tex.App. – Houston [1st Dist.] 1992, writ denied). Whether the sanction is "just" is measured by two standards: first, a direct relationship between the offensive conduct and the sanction imposed must exist; and second, the sanction imposed must not be excessive. *TransAmerican,* 811 S.W.2d at 917.

In exercising its discretion in choosing the appropriate sanction, the trial court is not limited to considering only the specific violation for which sanctions are finally imposed, but can consider everything that has occurred during the history of the litigation. *Berry-Parks Rental Equip.,* 842 S.W.2d at 757. As long as the sanction is "just," the rule leaves the choice of sanctions to the sound discretion of the trial court. *TransAmerican,* 811 S.W.2d at 917.

The record must reflect that the court considered the availability of lesser sanctions. *Otis Elevator Co. v. Parmelee,* 850 S.W.2d 179, 181 (Tex.1993). A permissible sanction should be no more severe than required to satisfy legitimate purposes. *Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 849 (Tex.1992); *F.N. Fausing Trading ApS v. Estate of Barbouti,* 851 S.W.2d 314, 318 (Tex.App. – Houston [1st Dist.] 1992, writ denied). However, case determinative sanctions may be imposed in the first instance in exceptional

cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules. *GTE Communications Sys. Corp. v. Tanner,* 856 S.W.2d 725, 729 (Tex.1993).

Before a court may deprive a party of its right to present the merits of its case because of discovery abuse, it must determine that "a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit." *TransAmerican,* 811 S.W.2d at 918. If a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim lacks merit and dispose of it. *Id.*

As a preliminary matter, the Doctors contend the Coles cannot show an abuse of discretion because the record does not contain a statement of facts from the September 4, 1992 sanctions hearing. However, the record shows that the September 4 hearing was not an evidentiary hearing. Moreover, the trial court's order states it relied on the pleadings and papers filed in support of the motion and on any oral argument of counsel. Thus, a statement of facts containing only the oration of counsel is not necessary on appeal. *Tilton v. Moye,* 869 S.W.2d 955, 957 (Tex.1994).

The Coles contend the trial court did not hear any evidence before imposing sanctions. When the trial court hears no evidence but expressly bases its decision on the papers filed and the arguments of counsel, there are no factual resolutions to presume in the trial court's favor. *Parmelee,* 850 S.W.2d at 181. In that instance, a reviewing court must look to the record to determine whether the

case determinative sanctions imposed by the trial court are just under *TransAmerican. Id.*

The record shows that no evidentiary hearings were held on any of the motions to compel or for sanctions. There was no evidence presented to the trial court before it entered the July 1992 and September 4, 1992, sanctions orders. However, before it enforced death penalty sanctions, the trial court had the affidavit of the Doctors' counsel, evidencing the Coles' discovery abuse. The Coles did not file any controverting affidavit or present other evidence in response to the motion to enforce sanctions.

The trial court's October order striking the Coles' pleadings sets forth the Coles' discovery abuses, which were its reasons for imposing the case determinative sanctions. First, the court found that the Coles did not produce documents after they were ordered to do so by March 23, 1992. The March order directed the Coles to produce the documents by March 23, 1992, or they would not be allowed to use them at trial.[1]

The affidavit of the Doctors' attorney states that after the issuance of the March order, the Coles produced many documents. Relying on representations made by the Coles' attorney, she believed that document production was complete up to that time. Once the deposition of

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[1] In their brief, the Coles acknowledge the March 20, 1992 oral order and the trial court's ruling: "[t]he trial court ruled (quite reasonably) that anything not located and produced would not be admitted into evidence." Therefore, we find the order to be valid. *See Tate v. Commodore County Mut. Ins. Co.*, 767 S.W.2d 219, 221-22 (Tex.App. – Dallas 1989, writ denied).

the Coles' accountant began, she realized that the Coles had not produced financial documents previously requested and related to the Coles' damage claims. She notified opposing counsel of the missing documents, and he indicated that the Coles would comply. When the Coles did not produce the promised documents, she filed the September motion to compel and for sanctions. When counsel received more documents on September 14, 1992, she again realized that documents that had been ordered produced had not been. The Coles did not present any controverting evidence. This evidence supports the trial court's finding that the Coles abused the discovery process when they did not comply with the March 1992 order.

Second, the trial court cited the Coles' failure to comply with the subpoena duces tecum issued for their accountant's deposition. Again, counsel's affidavit is evidence in support of the trial court's finding. She states that the accountant originally produced voluminous documents at his deposition that were to be copied, the Coles delayed in producing documents reviewed at the deposition, and they simply did not produce others reviewed at the deposition.

Third, the trial court found the Coles failed to produce, when ordered to do so by September 14, 1992, financial records that had been requested both in discovery requests and in the subpoena served on Cole. Counsel's affidavit supports this finding of discovery abuse. She states that she called the Coles' attorney on September 14, 1992, to inquire about the documents that had not been produced. She received some documents that evening but found many documents still missing: a list of

patients, all invoices to and correspondence with Medicare and Medicaid providers, all documents which support the Coles' financial statements and tax returns, and all complete professional income tax returns. She attached to her affidavit letters to the Coles' attorney seeking production of the documents. Counsel stated that without these documents, the Doctors could not prepare a defense.

Fourth, the trial court found that the Coles did not produce those documents by October 2, 1992, the date of the hearing to enforce the sanctions. Again, counsel's affidavit supports this finding. She states that after the September 14, 1992 deadline for production, she attempted to obtain documents from the Coles without success. Moreover, the affidavit of a paralegal working for the Coles' attorney states that the Coles did not produce the required documents to their attorney until about 5:15 p.m. on October 1, 1992.[2] The affidavit states the documents were not produced to the Doctors before October 2, 1992.

The record shows a pattern of discovery abuse. The Coles repeatedly failed to produce documents related to their claims and damages. The record indicates that the Coles did not produce documents after being ordered to do so in March 1992. They also did not comply with the trial court's July 1992 sanction order; there is no evidence that the Coles paid the $250 sanction for attorney's fees or supplemented their interrogatory answers as ordered.

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[2] The affidavit is attached to the Coles' motion for new trial.

Their failure to comply with previous orders supports the case determinative sanctions. *See Tanner,* 856 S.W.2d at 729-30. The death penalty sanctions were not excessive.

The record shows a direct relationship between the Coles' conduct and the sanctions imposed. There is evidence that the Coles' failure to produce documents prejudiced the Doctors' ability to prepare a defense. During his deposition in October 1991, Cole stated that he had other documents responsive to the subpoena duces tecum in storage, but he had not finished collecting them. When his deposition resumed in March 1992, Cole stated that he did not want to exclude the possibility that other documents responsive to the subpoena existed because he had not been able to go to storage and "ferret out" them. When asked what efforts had been made to investigate and review the materials in storage, Cole responded "very little."

The affidavit of their attorney's paralegal, stating that the Coles did not deliver documents to their attorney until after 5:00 p.m. on October 1, 1992, also supports the finding that the Coles were responsible for not producing documents to the Doctors. There is no evidence that the Coles' attorney personally hindered the discovery process. At Cole's deposition, he stated that the warehouses that had not been searched would be investigated within two weeks and everything found would be produced. The Coles' refusal to produce material evidence support the presumption that their claims lack merit. *TransAmerican,* 811 S.W.2d at 918.

The Coles did not complain to the trial court that they were unable to comply with any discovery requests

or orders until September 25, 1992, when they filed their motion for protection. This was after the trial court entered its September 4 order directing the Coles to produce documents by September 14 or have their pleadings stricken. The Coles' contention on appeal, that the trial court's orders were not clear, was not raised in the trial court or presented for a ruling. TEX.R.APP.P. 52(a).

We find the record supports a finding that the trial court's imposition of case determinative sanctions against the Coles was just.

We overrule point of error one.

In a supplemental point of error, the Coles contend that the trial court's orders are void because "most of the proceedings in this case, including the dispositive hearings, were held and judgment rendered in the courtroom of the 164th District Court in Harris County, Texas."[3]

The Coles assert that, although they did not object to the location of any proceeding, the trial court fundamentally erred. Fundamental error is a discredited doctrine. *Haney v. Purcell Co.*, 796 S.W.2d 782, 787 (Tex.App. – Houston [1st Dist.] 1990, writ denied). It exists "in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or Constitution of Texas." *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex.1993) (quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex.1982)). The record must

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[3] This lawsuit was filed in the 278th District Court, Walker County, Texas. Judge Bradley Smith was assigned the lawsuit as a visiting judge.

"affirmatively and conclusively" disclose such error. *Haney*, 796 S.W.2d at 787.

The record affirmatively shows that the order granting summary judgment and the final judgment signed by Judge Smith were filed of record in Walker County. The record does not show that Judge Smith rendered or signed the final judgment or interlocutory order granting summary judgment in Harris County instead of Walker County. *See Phagan v. State*, 510 S.W.2d 655, 663 (Tex.Civ.App. – Fort Worth 1974, writ ref'd n.r.e.) (holding no error because the record did not show the judgment was "rendered and signed" in a different county).

The record shows that on October 2, 1992, a hearing was held on sanctions, at which only argument of counsel was heard. At the conclusion, the judge stated, "I am going to" grant the motion and dismiss claims against the doctors. The final judgment mentions that hearing, stating that the judge struck the pleadings and dismissed those claims.

Appellants do not state what hearings they now object to or cite to any page of the record in which fundamental error occurred. We decline to search the record, which consists of 12 volumes of transcript, covering 2248 pages, for fundamental error. The record of the October 2 hearing identifies Judge Smith as the visiting judge of the 164th District Court and the presiding judge over this cause in the 278th District Court of Walker County, and it is styled "in the District Court of Walker County, 278th Judicial District." It identifies the court reporter, M.H. Edwards, as the "official court reporter in and for the 278th Judicial District Court of Walker

County. . . . " The record does not state where the hearing was held. Thus it does not affirmatively and conclusively establish error. *Haney,* 796 S.W.2d at 787.

We overrule the supplemental point of error.

We affirm the judgment.

WILSON and HEDGES, JJ., also sitting.

(Seal)

Court of Appeals

First District of Texas

COPY OF JUDGMENT

THOMAS C. COLE, JR., M.D., THOMAS C. COLE, JR., M.D. P.A, AND DOROTHY COLE, APPELLANTS

NO. 01-93-00085-CV V.

HUNTSVILLE MEMORIAL HOSPITAL, RALPH E. BEATY, WILLIAM L. NIX, M.D., HCA MANAGEMENT COMPANY, METHODIST RETIREMENT SERVICES, INC., JOE HELMS, CHESTER FREEMAN, JR., DAVID KNUTH, M.D., NATHAN W. COLWELL, M.D., MICHAEL C. DEBERARDINIS, M.D., JAMES M. HANNA, M.D., ROBERT L. HART M.D., R. CARL MAHAFFEY, M.D., J. STAN HINES, M.D., SUSAN E. NELSON, M.D., HOWELL TOWLER, M.D., PAUL VILARDI, M.D., AND LAWRENCE H. WELLS, M.D., APPELLEES

Appeal from the 278th District Court of Walker County, Texas. (Tr. Ct. No. 15759-C). Opinion delivered by Justice Cohen, Justices Wilson and Hedges also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on December 10, 1992. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED,**

AND ORDERED that the judgment of the court below be in all things **affirmed.**

It is further **ORDERED** that the appellants, THOMAS C. COLE, JR., M.D., THOMAS C. COLE, JR., M.D. P.A, AND DOROTHY COLE, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Wilson, and Hedges. Judgment entered FEB 15 1996.

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
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October 18, 1996

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RE: Case Number 96-0418
Style: THOMAS C. COLE, JR., M.D., et al.

v.

HUNTSVILLE MEMORIAL HOSPITAL, et al.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael Kopp
Michael Kopp, Deputy

First Amendment, 1 U.S. Statutes at Large 21 (1791).

ART. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment, 14 U.S. Statutes at Large 358 (1868).

ARTICLE XIV

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 USC § 1983.

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

NO. 15,749-C

THOMAS C. COLE, JR., M.D., Plaintiff	§	IN THE DISTRICT COURT OF
VS.	§	WALKER
HUNTSVILLE MEMORIAL HOSPITAL	§	COUNTY, TEXAS
Defendant	§	278TH JUDICIAL DISTRICT

PLAINTIFF'S SECOND AMENDED PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION
(Filed July 9, 1990)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Thomas C. Cole, Jr., M. D., Plaintiff, complaining of Huntsville Memorial Hospital, Defendant, and for his cause of action would show the Court the following:

Parties

1.

Plaintiff Thomas C. Cole, Jr., M. D., is an individual residing in Huntsville, Walker County, Texas, and is a medical doctor licensed to practice medicine in the State of Texas.

2.

Huntsville Memorial Hospital is a Texas non-profit corporation having its principal place of business in

Huntsville, Walker County, Texas. Huntsville Memorial Hospital has previously appeared in this cause.

* * *

13.

As defendants failed and refused to withdraw their unlawful notices on June 12, 1987 and July 24, 1987, Dr. Cole initiated suit. The original suit was filed on or about August 19, 1987; two days later the hospital and Executive Committee agreed to withdraw the unlawful notices. Subsequent to the hospital withdrawing the notice, Dr. Cole stood for election to the board of managers of the Walker County Hospital District. He and two other candidates comprised a slate of candidates running against the three incumbents. On Tuesday, November 3, 1987, Dr. Cole and two candidates running with him defeated the incumbent board by a substantial margin. Nine days later, on November 12, 1987, the hospital once again gave Dr. Cole notice that the Executive committee would recommend that his staff privileges not be renewed for the 1988 medical staff year.

* * *

20.

Dr. Cole would show the Court that the efforts to remove him from the medical staff of Huntsville Memorial Hospital are in direct violation of the Constitution and laws of the United States and the constitution and laws of the State of Texas. Specifically, the efforts to remove Dr. Cole from the medical staff of Huntsville

Memorial Hospital do not relate to any legitimate concerns of the hospital with respect to providing quality care to the residence [sic] of Walker County, Texas, nor do they relate to the reasons set forth in the medical staff bylaws. To the contrary, Dr. Cole would show that the efforts to remove him from the Huntsville Memorial Hospital medical staff are motivated largely by personal malice of certain present and former members of the Executive Committee of the Medical Staff, by a desire to retaliate against Dr. Cole for his past and present political activities as a member of the Walker County Hospital District Board and by Huntsville Memorial Hospital's desire to shirk and disregard its duty to provide medical care to the needy and disadvantaged citizens of Walker County. Specific violations of law will be set forth with respect to the particular causes of action alleged.

Causes of Action

* * *

26.

Huntsville Memorial Hospital deprived Dr. Cole, a citizen of the United States, of rights, privileges or immunities secured by the Constitution and laws under color of law. Accordingly, Dr. Cole is entitled to equitable and legal relief pursuant to 42 U.S.C. §1983.

CAUSE NO. 16,905-C

THOMAS C. COLE, JR., M.D., INDIVIDUALLY AND IN HIS PROFESSIONAL CAPACITY AS SOLE PROPRIETOR OF COLE MEDICAL OFFICE AND DOROTHY COLE	§	IN THE DISTRICT COURT OF WALKER COUNTY, TEXAS
VS.	§	278TH JUDICIAL DISTRICT COURT
RALPH E. BEATY, WILLIAM NIX, M.D., HCA MANAGEMENT COMPANY, INC., QUORUM HEALTH RESOURCES INC., NATHAN W. COLWELL, M.D., MICHAEL C. DeBERARDINIS, M.D., JAMES M. HANNA, M.D., ROBERT L. HART, M.D., DAVID KNUTH, M.D., R. KARL MAHAFFEY, M.D., J. STAN HINES, M.D., SUSAN E. NELSON, M.D., HOWELL TOWLER, M.D., PAUL VILARDI, M.D., LAWRENCE H. WELLS, M.D., CHESTER FREEMAN, JR., JOE HELMS, AND METHODIST RETIREMENT SERVICES, INC.	§	

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION

(Filed March 11, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THOMAS C. COLE, JR., M.D., Individually and in his professional capacity as sole proprietor of Cole Medical Office and DOROTHY COLE, and file this, their First Amended Original Petition complaining of RALPH E. BEATY, WILLIAM NIX, M.D., HCA MANAGEMENT COMPANY, INC., QUORUM HEALTH RESOURCES INC., NATHAN W. COLWELL, M.D., MICHAEL C. DEBERARDINIS, M.D., JAMES M. HANNA, M.D., ROBERT L. HART, M.D., DAVID KNUTH, M.D., R. KARL MAHAFFEY, M.D., J. STAN HINES, M.D., SUSAN E. NELSON, M.D., HOWELL TOWLER, M.D., PAUL VILARDI, M.D., LAWRENCE H. WELLS, M.D., CHESTER FREEMAN, JR., JOE HELMS, AND METHODIST RETIREMENT SERVICES, INC. and for causes of action which would show as follows:

* * *

HOSPITAL DISTRICT

58. The land and facilities operated by Huntsville Memorial Hospital are owned by the citizens of Walker County through the Walker County Hospital District ("District"). The District was created by the Texas legislature in 1971 to enable Walker County to levy taxes and

issue bonds for the purpose of constructing and operating a hospital system. As provided in the enabling legislation, the District is governed by a Board of Hospital Managers ("Managers").

59. In 1987 Plaintiff Cole was elected to the board of Managers of the Walker County Hospital District. One function of the Manager is to appropriately allocate the tax funds generated for the operation of the hospital system.

60. During Plaintiff Cole's tenure as a manager, certain issues arose regarding the tax funds to be allocated to Ella Smither Geriatric Center and thus to Defendant MRS for indigent care.

61. Specifically, Plaintiff Cole, in fulfilling his fiduciary responsibilities as an elected official of Walker County, has elected to make decisions and vote in a manner that serves the best interest of the citizens of Walker County, but that may not serve the best interests of Defendant Doctors, MRS, HCA, Helms, Freeman and Beaty. Plaintiff Cole has thus been subjected to intentionally malicious and unlawful acts in retaliation measure for voting the way he feels most appropriate for the citizens of Walker County.

62. Two areas of controversy that arose with Ella Smither Geriatric Center and Defendant MRS were the attempt to secure a needy care agreement and a detailed tracing of the tax funds allocated to Ella Smither for indigent care.

63. Failing to reach a satisfactory agreement with Defendant MRS regarding these issues, the District, in

August of 1990 voted to suspend the annual three hundred and twenty-five thousand dollars ($325,000.00) allocated to Ella Smither for indigent care.

ELLA SMITHER GERIATRIC CENTER

64. Defendant MRS operates Town Creek Methodist Retirement Community in Huntsville, Texas. Ella Smither is encompassed within Town Creek Methodist Retirement Community.

65. As early as August of 1990, when Defendants MRS, Helms, and Freeman perceived the District was going to cease indigent funding to Ella Smither, they began their cause of retaliatory action and joined the Defendant Doctors, Beaty and HCA to eliminate Plaintiff Cole from practicing in Walker County.

* * *

SUMMARY

73. The efforts to remove Dr. Cole from the medical staff of HMH and Ella Smithers do not relate to any legitimate concerns of the hospital or the retirement center with respect to providing quality care to the residents of Walker County, Texas. To the contrary, Plaintiff Cole would show that the efforts to remove him from the Huntsville Memorial Hospital Medical staff are motivated largely by personal malice of certain present and former members of the Executive Committee of the Medical Staff, by a desire to retaliate against Plaintiff Cole for his past and present political activities as a member of the Walker County Hospital District Board, Defendant HCA's

so that it may present a Hospital financial statement that appears attractive and by MRS so that it may present its retirement center in a favorable light.

* * *

Violation of Public Policy

94. Plaintiff Cole was subjected to these actions because he was acting in the recognized public interests. Plaintiff Cole was acting in the recognized public interest when he, as an elected public official as a Manager of the Walker County Hospital District requested that Defendant MRS provide a particularized audit and enter into an indigent care agreement. He was acting in the public interest when, as a Manager, he terminated the allocation of funds to Ella Smithers and thus to Defendant MRS due to the failure to provide and enter into an indigent care agreement.

95. Plaintiff Cole was subject to these actions because he was exercising a legal right. Plaintiff Cole has a right to run for and hold public office and a legal right to vote when in public office the way in which he considers to be in the best interest of his constituents.

96. Plaintiff Cole was subject to these actions because he was exercising a legal right. Plaintiff Cole has a legal right to free speech. Plaintiff Cole exercised that right of free speech in criticizing HMH, Defendant HCA and Defendant MRS.

97. Plaintiff Cole was subject to these actions because he was exercising a legal right. Plaintiff Cole has a legal right to pursue the livelihood of his choice.

98. The Defendants' actions were malicious, arbitrary, capricious, and in willful violation of Plaintiff Cole's property interest in his reputation and his right to pursue employment of his choice and his right to hold political office and vote for the candidates of his choice and are the proximate cause of damages suffered by Plaintiff Cole.

* * *

NO. 15,749-C

THOMAS C. COLE, JR., M.D.,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	WALKER COUNTY, TEXAS
HUNTSVILLE MEMORIAL HOSPITAL	§	278TH JUDICIAL DISTRICT
Defendant	§	

ORDER

(Filed Sep. 12, 1991)

Came before the Court the captioned cause upon Plaintiff's Motion to Consolidate Cases. The Court being advised of the premises, is of the opinion that the motion is meritorious. It is therefore,

ORDERED, ADJUDGED AND DECREED that cause no. 15,749-C, styled *Thomas C. Cole, Jr., M.D. v. Huntsville Memorial Hospital* and cause no. 16,905-C, styled *Thomas C. Cole, Jr., M.D. v. Ralph E. Beatty, et al,* be and are hereby CONSOLIDATED for all purposes. Henceforth all pleadings in both cases shall be filed in cause no. 15,749-C and served upon all counsel of record who have appeared in either case.

SIGNED this 10th day of September, 1991.

/s/ J. Bradley Smith
JUDGE PRESIDING

NO. 15,749-C

THOMAS C. COLE, JR., M.D.,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	WALKER COUNTY,
VS.	§	TEXAS
	§	
HUNTSVILLE MEMORIAL HOSPITAL	§	278TH JUDICIAL
	§	DISTRICT
Defendants.	§	

PLAINTIFF THOMAS C. COLE, JR., M.D.'S REPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 13, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Thomas C. Cole, Jr., M.D. ("Dr. Cole"), and files this Reply in Opposition to Defendant's Motion for Summary Judgment:

I. OVERVIEW

In its Motion for summary Judgment, Huntsville Memorial Hospital ("Huntsville") does not meet its burden of showing that there are no disputed fact issues in this case. In fact, Huntsville adduces no probative evidence in support of its claims, relying instead on unsubstantiated and pejorative allegations of disputed facts to bolster its position. This court should reject Huntsville's attempts to prevent Dr. Cole from getting a jury trial on disputed fact issues in this matter.

A. PROCEDURAL POSTURE

The standards for granting summary judgment in Texas are well established. In Texas, summary judgment may only be granted if the evidence adduced by the movant affirmatively shows that there is no disputed issue of material fact. Tex. R. Civ. P. 186; *Black v. Victoria Lloyds Insurance Co.*, 797 S.W.2d 90 (Tex. 1990); *Burns v. Thomas*, 786 S.W.2d 266 (Tex. 1990). Summary judgment is not intended to replace trial by jury with trial by affidavit. *Gaines v. Hamman*, 358 S.W.2d 557 (Tex. 1962). Rather, it exists only to dispose of patently unmeritorious claims and untenable defenses. *In re Price's Estate*, 375 S.W.2d 900 (Tex. 1964); *Ross v. Texas One Partnership*, 796 S.W.2d 206 (Tex. App. – Dallas 1990), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991)); *Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788 (Tex. App. – Beaumont 1988, writ denied). Thus, summary judgment in Texas ia [sic] a "harsh remedy" and is to be "strictly construed." *International Insurance Co. v. Hermann G. West, Inc.*, 649 S.W.2d 824, 825 (Tex. App. – Fort Worth 1983, no writ). The rule of strict construction applies to procedural as well as substantive issues. *Id.* Summary judgment is a statutory remedy unknown at common law; thus, in order to be entitled to the remedy, a movant must comply strictly with the rule's requirements. *Rozsa v. Jenkinson*, 754 S.W.2d 507 (Tex. App. – San Antonio 1988, no writ).

In this case, Huntsville is not entitled to summary judgment on Dr. Cole's claims. First, it has utterly failed to adduce probative evidence in support of its claims that it provided Dr. Cole with due process. Keith Dubanevich, the lawyer for Huntsville who attempts to authenticate the materials submitted by Huntsville, lacks personal

knowledge as to the matters stated in his affidavit. Mr. Dubanevich was not at the hearing conducted by Huntsville on Dr. Cole's privileges; thus, he has no personal knowledge regarding what was introduced at that hearing or what the panel considered. See Plaintiff's Objection to Affidavit of Keith S. Dubanevich, submitted contemporaneously herewith and incorporated herein by reference for all purposes. Even if Huntsville had submitted competent evidence, however, the hospital's evidence falls far short of the showing necessary to support Huntsville's Motion. For example, the hospital did not submit any affidavits from the persons on the various hearing panels that made the decisions regarding Dr. Cole's privileges. Rather, it submitted only the affidavit of Ralph Beaty, the hospital's Administrator. In his affidavit, Beaty makes no attempt to explain the hospital's actions; rather, the affidavit is simply a recitation of the procedural steps taken by Huntsville leading up to the termination of Dr. Cole's privileges.

Nor do Defendants address the causes of action pleaded by Dr. Cole in their motion. Rather, they quote snippets out of context from various opinions addressing causes of action not brought by Dr. Cole in an attempt to create a smoke-screen behind which they can excuse their improper conduct in terminating Dr. Cole's privileges. As shown in more detail below, Dr. Cole has pleaded and adduced evidence sufficient to support each of the claims he has brought. Thus, summary judgment is not appropriate.

II. DR. COLE HAS A CLAIM UNDER SECTION 1983

The initial claim brought by Dr. Cole is a federal claim under 42 U.S.C. § 1983. The elements of a claim under § 1983 are well established: "A section 1983 claim has two elements: a deprivation of rights secured by the Constitution or federal law and action under color of state law." *Hatteras v. Southwestern Bell Telephone Co.*, 774 S.W.2d 1341, 1343 (5th Cir. 1985) (citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729 (1978)) (footnotes omitted). Thus, unless Huntsville has established either that Dr. Cole had no protectible property interest in his privileges or that defendants were not acting under color of state law, summary judgment on this claim must be denied.

A. DR. COLE'S DUE PROCESS RIGHTS WERE VIOLATED BY HUNTSVILLE

Huntsville first argues that Dr. Cole's privileges to practice at the hospital do not constitute a protectible property interest. Motion for Summary Judgment at 5. Huntsville's argument is contrary to established constitutional principles. Federal courts[1] have long recognized that physicians have a protectible property interest in their privileges to practice at a hospital. *Caine v. Hardy*,

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[1] Section 1983 is a federal statute; thus, federal case-law is controlling on the scope and interpretation of the Act. Furthermore, the act protects rights and privileges secured by the Untied [sic] States Constitution. Huntsville cites no federal authority for its claim that Dr. Cole's staff privileges are not a protectible property interest under § 1983.

905 F.2d 858 (5th Cir. 1990); *Northeast Georgia Radiological Associates, P.C. v. Tidwell*, 670 F.2d 507, 511 (5th Cir. 1982); *Shaw v. Hospital Authority*, 507 F.2d 625 (5th Cir. 1975), *aff'd on rehearing*, 614 F.2d 946 (5th Cir. 1980). In *Tidwell*, the court noted: "Medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to its termination or withdrawal, absent some extraordinary situation . . . " 670 F.2d at 511. Thus, for purposes of Dr. Cole's § 1983 action, there can be no question that he has a property interest in his privileges that could not be deprived without due process.

* * *

The summary judgment evidence shows that contrary to Huntsville's assertions, Dr. Cole had a protectible property interest in his privileges and that Huntsville terminated those privileges without providing due process, thus violating 42 U.S.C. § 1983. A fact issue exists as to the first element of Dr. Cole's § 1983 action.

B. HUNTSVILLE ACTED UNDER COLOR OF STATE LAW

The second element of Dr. Cole's section 1983 claims is that Huntsville acted "under color of state law." In its motion, Huntsville attempts to characterize itself as a "private" hospital, omitting most of the facts relevant to its connection with the state. The facts in this case clearly establish that Huntsville is a "state actor" for purposes of section 1983.

It is well established that whether a defendant acted under color of state law is a "necessarily fact-bound

inquiry." *Lugar v. Edmondson Oil Co., Inc,* 102 S. Ct. 2744, 27555 (1982); *Hatteras v. Southwestern Bell Telephone Co.,* 774 F.2d 1341, 1343 n.4 (5th Cir. 1985). Where a fact issue exists regarding the relationship between the defendant and the state, summary judgment should be denied. *See, e.g., Morrison v. Washington County, Alabama,* 700 F.2d 678 (11th Cir. 1983) (reversing summary judgment where fact issue existed regarding whether defendant acted under color of state law). In this case, the summary judgment evidence clearly raises a fact issue as to whether Huntsville acted under color of state law.

The hospital operated by Huntsville was originally constructed by the Walker County Hospital District (the "District"). Affidavit of Thomas C. Cole, Jr. at 2. The District was created by the Texas Legislature in 1971. Tex. Rev. Civ. Stat. Ann. art. 4494q; *see* Acts 1971, 62nd Legislature, p. 2583, ch. 848; Cole Aff. at 1 and Exh. "1." Its Board is publicly elected, Cole Aff. at 1, and it has taxing authority under its enabling legislation, *id.* at 2 and Exh. "1." The enabling act creating the District expressly states that the District is a state agency. Cole Aff. at Exh. "1," § 14. It is thus beyond dispute that the District is a state agency for purposes of the fourteenth amendment and federal civil rights acts. *See Jatoi v. Hurst-Euless-Bedford Hospital Authority,* 807 F.2d 1214, 1220 & n.5 (5th Cir. 1987); *Sosa v. Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173, 174 (5th Cir. 1971). In *Sosa,* the Fifth Circuit held:

> The Board of Managers is the governing body of the Val Verde Memorial Hospital, which is a county institution established pursuant to Vernon's Ann. Tex. Rev. Civ. Stat. arts 4478 to

> 4494r-3. The Board is appointed by the County Commissioner's Court of Val Verde County and the hospital was constructed, is maintained and operated with county funds supplemented with federal aid under the Hill-Burton Act, 42 U.S.C. § 291. It is perfectly clear, therefore, that the Board of Managers of the Val Verde Memorial Hospital is a public body receiving both state and federal funds. Its acts are thus state acts and must comport with the provisions of the Fourteenth Amendment.

437 F.2d at 174. Similarly, in this case the District was created by legislative authority under arts. 4478 to 4494r-3, is maintained by public tax funds, and its Board is publicly elected. Thus, the District is clearly a state actor.

The District built the hospital managed by defendants with bonds it issued. Cole Aff. at 2. Defendant leased the hospital in 1977. *Id.* at 1. Critically, Defendant acknowledged in the lease that the hospital is a public entity:

> The Corporation (HMH) recognizes that, under the Act, the District is created as a political subdivision of the State of Texas and is charged with the responsibility of providing hospital care for the needy inhabitants of the District. Further, the Corporation recognizes that property owned by the District is to be held for public purposes only, devoted exclusively to the use and benefit of the public and operated without the intervention of private profit for the use and benefit of the public. The Corporation covenants that it shall in all respects comply with the Act and endeavor to carry out the intent and

> purposes of the Act and, to that end, the Project shall be operated as contemplated by the Act for the reception, care and treatment of the members of the general public on a non-profit basis for the promotion of the health and well-being of the citizens of the District and for the provisions of hospital care to the District's needy inhabitants.

Cole Aff. at 2, Exh. "2" at § 8.5. Thus, Defendant has acknowledged that the hospital "is to be held for public purposes only" and agreed in the lease to "comply with the [enabling] Act" and to "carry out the intent and purposes of the Act." *Id.*

The Fifth Circuit recently examined a virtually identical arrangement between a hospital district and a private, non-profit management corporation in *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5th Cir. 1987). In *Jatoi*, the plaintiff sought review of the decision of Hurst-Euless-Bedford Hospital ("HEB") to terminate his staff privileges. The court noted that HEB hospital was operated by a private, non-profit corporation that leased the hospital from the state-created Hospital Authority, *id.* at 1217, just as Defendant Huntsville leases the hospital in this case from the District. The court also noted that revenues generated by the operation of the facility were used to repay bonds issued to construct the hospital. *Id.* at 1221. The Fifth Circuit found that the relationship between the Authority and the hospital was sufficiently close that the actions of the hospital's management were "state" action for purposes of the fourteenth amendment and 42 U.S.C. § 1983:

> *Burton [v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856 (1961)]. . . . must be the controlling precedent here. The HEB Hospital Authority, like the Wilmington Parking Authority, is a public corporation created by statute to serve a public purpose. As in *Burton*, the facilities were publicly owned and were constructed with public funds. As in *Burton*, the Authority derived a direct financial benefit from its private lessee. . . . The Hospital Authority's repayment of the bonds it issued and the mortgages it entered into were dependent on successful operation of the hospital. The Authority continued to finance the hospital through bonds, mortgages, and local fund raising.

807 F.2d at 1221. The facts are identical in this case. The District, like the HEB Hospital Authority, is a public agency. Cole Aff. at 1, Exh. "1." The hospital is owned by the District and was constructed with public funds. *Id.* The bonds issued to construct the facility are repaid out of operating revenues with any short fall being made up out of tax revenues. *Id.* at 2.

Furthermore, the lease terms make it clear that Defendant is charged with operating the hospital in accordance with the District's public purpose. Cole Aff. at 2, Exh. "2." As in *Jatoi*, the District "was the lessor of the facility and continued to hold the purse strings." 807 F.2d at 1221; Cole Aff. at 2. The District is entitled to have a representative at each meeting of the Defendants' Board of Directors. *Id.* Thus, it "monitored the activity of its lessee." 807 F.2d at 1221. In language that applies by its terms to this case, the Fifth Circuit concluded:

> The private defendants cannot receive public funds, utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any correction of a violation of the constitutional rights of their medical staff.

Id. at 1221-22.

Indeed, in terminating Dr. Cole's privileges, Huntsville was acting as the statutory agent of Walker county. As Huntsville itself pointed out in its Motion to Dismiss in federal court, the enabling statute creating the Walker County Hospital District was amended in 1977. Under the amended enabling statute, the District was authorized by state law to " . . . enter into an operating or management contract . . . and . . . delegate to the manager the power to . . . remove doctors from the staff." Acts 1971, 62nd Leg., p. 2583, ch. 848, amended by Act 1977, 65th Leg., p. 1325, ch. 527. Pursuant to this authority, the District hired Huntsville Memorial Hospital. As the statutory agent of a specially created state agency, exercising a power granted by the legislature to that state agency, Huntsville cannot sensibly deny that it was acting under color of state law.

* * *

NO. 15,749-C

THOMAS C. COLE, JR., M.D.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	WALKER COUNTY, TEXAS
v.	§	
HUNTSVILLE MEMORIAL HOSPITAL	§	278TH JUDICIAL DISTRICT
Defendants.	§	

AFFIDAVIT OF DR. THOMAS C. COLE, JR.

(Filed Dec. 13, 1991)

THE STATE OF TEXAS §
§
COUNTY OF WALKER §

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS C. COLE, JR., M.D., whose name is subscribed hereto and who, after being by me duly sworn did upon his oath depose and state as follows:

> My name is Thomas C. Cole, Jr. I am over eighteen years of age, have never been convicted of a felony and am fully competent to make this Affidavit. The facts stated herein are within my personal knowledge and are true and correct.
>
> I am a physician licensed to practice in the State of Texas. For the past sixteen years, I have practiced medicine in Walker County, Texas. Many of my patients are indigents dependent upon Medicare and Medicaid to cover their medical expenses. I am one of only two physicians in

Walker County that provides treatment to Medicaid patients on a regular basis.

In 1971, the Texas Legislature authorized the creation of the Walker County Hospital District for the purpose of constructing and operating a hospital for indigent persons in Walker County, Texas. A true and correct copy of the enabling legislation passed by the Texas Legislature is attached hereto as Exhibit "1." The board of the hospital district is publicly elected. I was elected to the board of the hospital district on November 3, 1987. I served continuously from that date until November of 1991 and was chairman of the Walker County Hospital District Board from November 1989 until November of 1991. In 1977, Walker County Hospital District leased its hospital to Huntsville Memorial Hospital, Inc. ("HMH"). A true and correct copy of the lease between the Hospital District and HMH and an Amendment to the lease are attached hereto as Exhibit "2" and "2A". Under that lease, HMH expressly recognized that the hospital is owned by the Walker County Hospital District, a public entity. Similarly, much of the equipment in the hospital is owned by the Walker County Hospital District.

HMH also acknowledged in the lease that the hospital existed to serve a public purpose and agreed to operate the hospital in accordance with that purpose and to assist the district in achieving its public ends.

The hospital leased to HMH was constructed by the Walker County Hospital District. In order to finance construction, the district issued bonds. Under the terms of the lease, operating revenues are used to pay back the bonds. The Hospital

District thus derives a direct economic benefit from Huntsville's management of the hospital.

As a member of the Walker County Hospital District, it was my obligation to oversee the activities of HMH in order to insure that it is acting in accordance with that public purpose. Under the lease, the district is permitted to have a representative at each board meeting of HMH to insure that the company is acting in accordance with the public purpose for which the hospital was built. I was chosen to attend those board meetings on behalf of the district and to act as overseer of the hospital's activities in this regard.

HMH has received Hill-Burton Act grants over the years.

Because the majority of my patients are residents of Walker County, I have practiced for the past sixteen years at HMH. I have had staff privileges there for sixteen years. In 1987, HMH commenced its effort to terminate my staff privileges at the hospital.

I was first notified of the current effort to terminate my privileges by letter dated June 12, 1987, a true copy of which is attached as Exhibit "3". Thereafter, on June 24, 1987, a statement of specific charges against me was mailed to me, a true copy of which appears as Exhibit "4". The June 12, 1987, letter purported to notify me that the hospital did not intend to renew my privileges for medical staff year 1987, although the medical staff year had commenced many months earlier. I immediately filed suit and made demand pointing out that the hospital had flagrantly violated its own by-laws in that decisions regarding reappointment were required to be

made prior to the medical staff year. The hospital agreed to withdraw the charges, but expressly reserved its right to renew its charges prior to the 1988 medical staff year.

By letter dated November 12, 1987, a true copy of which is attached hereto as Exhibit "5", I was notified that the hospital intended not to renew my staff privileges for the 1988 medical staff year. I was thereafter supplied a Statement of Grounds and Reasons, a true copy of which is attached as Exhibit "6", which substantially reiterated the charges that had been leveled in June of 1987.

In response to the later 1988 notice, I amended my lawsuit to attempt to take certain key depositions to be prepared to defend myself in the administrative hearings to which I was entitled under the hospital's by-laws. I was successful at the trial court level in obtaining an order allowing me certain depositions, but the hospital appealed that order and the proceedings were tied up for the balance of the year. On or about November 29, 1988, I received a letter notifying me that the hospital did not intend to renew my medical staff privileges for the 1989 medical staff year. The charges against me were substantially the same as the charges leveled in June of 1987, and again in the fall of 1988. By February 1988, the court proceeding that had held up the hearings at the hospital were concluded when the Court of Appeals reversed the trial court and the Supreme Court refused to hear my appeal of that order. Attached as Exhibit "7" is a true copy of a notice that the Supreme Court overruled my appeal on February 15, 1988.

By letter dated December 23, 1988, I had demanded a hearing of the charges leveled against me for the third time on November 29, 1988. A true copy of my demand is attached hereto as Exhibit "8". Although the court proceedings were concluded in the hospital's favor, and the hospital was free to proceed with the hearing, the hospital never convened a hearing on the charges.

On or about November 16, 1989, I again received a letter notifying me that the hospital would not renew my staff privileges for the 1990 medical staff year. A true copy of the letter is attached as Exhibit "9". I again demanded a hearing and I again received a Statement of Charges reasserting essentially the same charges which had been asserted in June 1987, November, 1987, and November 1988. A true copy is attached as Exhibit "10". A hearing was finally convened in the spring of 1990, nearly three years after the charges had first been leveled against me. A true and correct copy of the hearing panel's decision is attached hereto as Exhibit "13."

It is my belief that the hospital and the members of the Executive Committee directly involved in the hospital's efforts to terminate my staff privileges acted with personal ill-will toward me in bad faith. They routinely disregarded my rights without excuse. On one occasion in 1988, when the hospital proposed to hold a hearing involving my privileges to treat a particular patient, I was notified that the hearing officer would be an attorney named David M. Davis. I personally inspected a legal directory which reflected that Mr. Davis listed as one of his principal clients an

affiliate of Hospital Corporation of America, the hospital corporation that employed Mr. Ralph Beatty, the Administrator of HMH and the person principally responsible for the day-to-day activity in connection with revoking my hospital privileges. I had to specifically object to Mr. Davis or HMH intended to have one of its own lawyers sit in judgment over me.

As I previously mentioned, although I demanded and was entitled to a hearing in 1989, I was never granted a hearing. When I was finally granted a hearing on the charges in 1990, some of the most outrageous charges against me were simply dropped and no evidence was put on in support of them. Several of the charges were based upon single anonymous notes by nurses long since gone from HMH.

Perhaps the most egregious example reflecting the personal malic [sic] and ill-will that the hospital administration and Executive Committee had against me and the lengths to which they were willing to go to deprive me of my privileges was the charge appearing in the most recent Statement of Grounds that I had assaulted Ms. Jane Taylor. When I was first confronted about the incident Mr. Ralph Beatty, the hospital administrator shouted obscenities to me in the hallway of the hospital and threatened me with physical harm. Although it was alleged that I had assaulted Ms. Taylor and that charge was revealed and exhibited to the three doctors sitting on the hearing panel, the hospital simply withdrew the charge at the hearing and never attempted to put on any evidence as to its truth. The person I had allegedly assaulted, Ms. Jane Taylor was personally in the hearing room at

various times during the proceedings so I knew she was available as a witness. The hospital was also aware that an eye witness to the alleged incident, a hospital employee, had agreed to appear as a witness and expose the fact that the charge was wholly false and fabricated.

Dr. de Berandinis, one of the Executive Committee members and one of the persons responsible for amassing the charges against me, leveled a particular charge against me that demonstrates his ill-will and personal spite. He alleged that I had failed to tell Mr. Odel Byers about the results of a bone scan. The evidence at the hearing confirmed that I had in fact been treating Mr. Byers for the illness that I allegedly had not told him about. Dr. de Berandinis testified that the reason there was no evidence of any hospital investigation of his claim was that he and Mr. Beatty had discussed that the charges should simply be thrown in a pile and presented en mass [sic], a procedure calculated to deprive me of any meaningful opportunity to defend myself at the time of the alleged events.

As a final example of the bad faith of the hospital, and the personal malice obviously directed toward me, I would point out the [sic] I was the subject of one other peer review proceeding during the relevant time period. On December 8, 1988, without prior notice to me, my privileges to treat a particular patient were summarily suspended. The suspension was imposed by Ralph Beatty and Dr. Nix, a member of the Executive Committee and chief of staff at the time. Attached hereto as Exhibit "11" is a copy of the letter I received dated December 9, 1988, advising that the suspension had been imposed to

prevent immediate danger to the patient. Allegedly it was determined by Mr. Beatty and Dr. Nix that there was an imperative need to transfer the patient to a burn unit.

The very next morning, Dr. Sally Abston, the director of the burn unit to which the patient had been transferred, notified Dr. Nix that the patient had not needed to be transferred and suggested that the patient had been dumped. At a meeting of the Executive Committee to review the summary suspension, I presented to the committee a signed statement by Dr. Abston, a copy of which is attached as Exhibit "12", confirming that there had been no medical necessity for a transfer, let alone the type of emergency that might justify a summary suspension without notice. Nevertheless the Executive Committee confirmed the action of Ralph Beatty and Dr. Nix and put me to the expense and anguish of going through the hospital hearing procedures. While I was ultimately vindicated, it came out at the hearing that Dr. Nix, the chief of staff and medical doctor involved in the summary suspension, had not seen the patient and had not even talked to the doctor who did see the patient. Rather, the decision to suspend me and transfer the patient was made by Ralph Beatty, who was not even a medical doctor. When the entire Executive Committee was presented with the written statement of an expert in the field indicating that Ralph Beatty had acted imprudently in summarily suspending me, the Executive Committee chose not to reverse that clearly erroneous action, but rather to put me to the expense, anguish, and public ridicule of a hearing. The foregoing facts all appear in the transcript of the hearing on the Annie Merchant

matter and resulting decisions, all of which are being filed simultaneously with this affidavit and verified by the affidavit of Phillip T. Bruns.

It also appears that during the Annie Merchant hearing, Ralph Beatty had *ex parte* communications with the hearing examiner, Michael Sharp, and the grounds for the suspension were changed without notice to me. As reflected in the Annie Merchant hearing transcript, the examiner announced at the conclusion of the hearing that he was taking judicial notice of a law review article written by the hospital's lawyer's partner and addressing the issue of so-called "disruptive" physicians. When Mr. Sharp issued his ruling, a copy of which is attached to Mr. Bruns' affidavit, he acknowledged that the evidence did not support the stated ground for the suspension, danger to Ms. merchants' health, but purported to affirm the suspension on the new ground that I was uncooperative and disruptive. HMH's answer to interrogatory no. 4, a copy of which is attached to Mr. Bruns' affidavit, confirms that Mr. Beatty supplied the article to Mr. Sharp with no notice to me.

Based upon the foregoing, I can only conclude that the hospital has never intended to determine the truth or accuracy of its charges in good faith. Rather, the outcome of the proceedings were preordained, the proceedings were conducted in complete disregard of my rights, and the proceedings were substantially motivated by evil motive, spite, malice and ill-will against me.

Further Affiant saith not.

/s/ Thomas C. Cole Jr. MD
THOMAS C. COLE, JR., M.D.

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of December 1991, to certify which witness my hand and official seal.

/s/ Kay Keeling
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

[SEAL] KAY KEELING
NOTARY PUBLIC
STATE OF TEXAS
Commission Expires 1-20-95

LEASE, MORTGAGE, DEED OF TRUST, ASSIGNMENT OF PRODUCTION AND SECURITY AGREEMENT

between

WALKER COUNTY HOSPITAL DISTRICT OF WALKER COUNTY, TEXAS

and

HUNTSVILLE MEMORIAL HOSPITAL

Dated as of July 1, 1977

PARTIES

LEASE, MORTGAGE, DEED OF TRUST, ASSIGNMENT OF PRODUCTION AND SECURITY AGREEMENT dated as of July 1, 1977 (this "Lease"), between

WALKER COUNTY HOSPITAL DISTRICT OF WALKER COUNTY, TEXAS (the "District"), a body politic and corporate and a governmental agency of the State of Texas, created and operating under the provisions of the Walker County Hospital District Act, Acts of the 62nd Legislature, Regular Session, 1971, Chapter 848, Page 2583, *et seq.*, as amended (the "Act"), enacted pursuant to Article IX, Section 9 of the Constitution of Texas, and HUNTSVILLE MEMORIAL HOSPITAL (the "Corporation"), a non-profit corporation, duly organized and existing under the laws of the State of Texas.

PRELIMINARY STATEMENT

The District presently owns certain parcels of real property, buildings, improvements and equipment comprising a 112-bed acute care general hospital located in Huntsville, Walker County, Texas, and leases said hospital to the Corporation. The District has determined that in order to establish and maintain an adequate hospital system within the boundaries of the District to furnish hospital care to persons residing in said District, to promote the public welfare of the people of the State of Texas and to provide hospital care to the needy inhabitants of the District, a new hospital, providing increased bed capacity and improved and expanded hospital care and services, must be purchased, constructed, acquired and equipped to replace the existing hospital. The District has acquired, or proposes to acquire simultaneously with the delivery of this Lease, certain parcels of real property in Walker County, Texas, and proposes to cause to be constructed or installed thereon certain buildings, improvements, facilities, equipment and other property which

will comprise a 140-bed acute care general hospital. To finance the costs of purchasing, constructing, acquiring and equipping such buildings, improvements, facilities, equipment and other property, the District proposes to issue its First Mortgage Revenue Bonds, Series A (Huntsville Memorial Hospital), in the aggregate principal amount of $12,205,000. Such Bonds are to be secured generally by an assignment of the District's interest in this Lease and the rentals and certain other receipts to be derived by the District from the Project hereinafter referred to and will be issued under and additionally secured by an Indenture of Mortgage and Deed of Trust dated as of the date hereof, from the District to Texas Commerce Bank National Association, Houston, Texas, a national banking association, as Trustee.

Under the provisions of the Act, the District has the power to purchase and acquire such parcels of real property, to purchase, construct, acquire and equip such buildings, improvements, facilities, equipment and other property, to lease the same to the Corporation and to issue and sell the Bonds. To achieve certain of the objectives outlined above, the District and the Corporation have entered into this Lease.

It is the intent of the parties that this Lease create a relationship between them in which the Corporation is associated or affiliated with or is controlled by the District to such an extent that the costs applicable to services, facilities and supplies furnished to the Corporation by the District are includable in the allowable cost of the Corporation, at the cost of the District, under applicable Medicare/Medicaid regulations.

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration and of the mutual benefits, covenants and agreements hereinafter expressed, the District and the Corporation agree as follows:

* * *

NO. 15,749-C

THOMAS C. COLE, JR. M.D. ET UX	:	IN THE DISTRICT COURT OF
VS.	:	WALKER COUNTY, TEXAS
HUNTSVILLE MEMORIAL HOSPITAL, ET AL	:	278TH JUDICIAL DISTRICT

ORDER

(Filed March 20, 1992)

BEFORE THE COURT IS DEFENDANT HUNTSVILLE MEMORIAL HOSPITAL'S MOTION FOR SUMMARY JUDGMENT. THE COURT, HAVING CONSIDERED THE SAME AND THE BRIEFS OF THE PARTIES AND THE EVIDENCE RELATING THERETO, HAS MADE THE FOLLOWING FINDINGS:

I.

THE DECISION BY DEFENDANT HUNTSVILLE MEMORIAL HOSPITAL NOT TO RENEW THE MEDICAL STAFF PRIVILEGES OF PLAINTIFF, THOMAS C. COLE, JR., M.D. WAS STATE ACTION FOR THE PURPOSES OF DR. COLE'S CLAIM UNDER § 1983. FURTHERMORE, THIS COURT FOUND THAT DR. COLE HAD A PROTECTABLE PROPERTY INTEREST IN MEDICAL STAFF PRIVILEGES AND THAT DR. COLE WAS ENTITLED TO JUDICIAL REVIEW OF THE PROCEEDINGS BY THE HOSPITAL REVIEW PANEL.

II.

THIS COURT HAS DETERMINED THAT THE NOTICE AND HEARING PROVIDED BY HUNTSVILLE MEMORIAL HOSPITAL TO DR. COLE

WAS CONSTITUTIONALLY ADEQUATE AND SATISFIED THE REQUIREMENTS OF PROCEDURAL DUE PROCESS. IN ADDITION THIS COURT HAS DETERMINED THAT THE DECISION OF THE HOSPITAL REVIEW PANEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. THUS, THE PLAINTIFF WAS PROVIDED SUBSTANTIVE AS WELL AS PROCEDURAL DUE PROCESS.

III.

FURTHER, THIS COURT HAS FOUND THAT PLAINTIFF DOES NOT HAVE STANDING TO ASSERT A CAUSE OF ACTION UNDER EITHER THE TEXAS MEDICAL PRACTICES ACT OR THE TEXAS HEALTH AND SAFETY CODE.

IT IS THEREFORE, **ORDERED, ADJUDGED,** AND **DECREED** THAT DEFENDANTS MOTION FOR SUMMARY JUDGMENT IS HEREBY GRANTED.

SIGNED AND ENTERED THIS 18TH DAY OF MARCH, 1992.

/s/ J. Bradley Smith
JUDGE PRESIDING.

No. 96-

Court of Appeals NO. 01-93-00085-CV

IN THE

SUPREME COURT

OF TEXAS

THOMAS C. COLE, JR., M.D., ET AL
Petitioners

V.

HUNTSVILLE MEMORIAL HOSPITAL, ET AL
Respondents

APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT:

THOMAS C. COLE, JR., M.D., THOMAS C. COLE, JR., M.D., P.A., and DOROTHY COLE see a writ of error to review the opinion and judgment of the Court of Appeals of February 15, 1996 and would show:

* * *

b. The Court of Appeals erred in holding that the Hospital did not engage in State Action:

It is well established that whether a defendant acted under color of state law is a "necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co., Inc,* 102 S. Ct. 2744, 2755 (1982); *Hatteras v. Southwestern Bell Telephone Co.,* 774 F.2d 1341, 1343 n.4 (5th Cir. 1985). Where a fact issue exists regarding the relationship between the defendant

and the state, summary judgment should be denied. *See, e.g., Morrison v. Washington County, Alabama,* 700 F.2d 678 (11th Cir. 1983) (reversing summary judgment where fact issue existed regarding whether defendant acted under color of state law). In this case, the summary judgment evidence clearly raises a fact issue as to whether Huntsville acted under color of state law.

It is undisputed that the Hospital premises are owned by the Walker County Hospital District, an entity established by the State Legislature. The Legislature has enacted that the Hospital District "*shall* provide for the establishment of a hospital or hospital system within its boundaries to furnish hospital care to person residing in said District . . . " (Acts 62nd Leg. Ch. 848, p. 2583, Tr. VIII at 7). Thus, the State itself has specifically mandated the existence of the Hospital. The Hospital premises were acquired and it [sic] building was built with funds from public bonds. (Tr. VIII at 38, 92). The Hospital District leased the premises to Huntsville Memorial Hospital, the present defendant. (Tr. VIII at 17-121). By the terms of the lease, the Hospital District has delegated the day to day operations to the Hospital, but retains the right to oversee the operations. (Tr. VIII, 73-94). The lease recognized the public nature of the enterprise:

> Section 8.5 *Public Purpose.* The Corporation [the present defendant] recognizes that, under the Act, the District is created as a political subdivision of the State of Texas and is charged with the responsibility of providing hospital care for the needy inhabitants of the District. Further, the Corporation recognizes that property owned by the District is to be held for public purposes only, devoted exclusively to the

> use and benefit of the public and operated without the intervention of private profit for the use and benefit of the public. The Corporation covenants that it shall in all respects comply with the Act and endeavor to carry out the intent and purposes of the Act and, to that end, the Project shall be operated as contemplated by the Act for the reception, care and treatment of the members of the general public on a non-profit basis for the promotion of the health and well being of the citizens of the District and for the provision of hospital care to the District's needy inhabitants. _

(Tr. VIII at 75-76).

There are three Fifth Circuit cases involving the issue of whether an allegedly private hospital was engaged in state action: *Albright v. Longview Police Dept.*, 884 F.2d 835 (5th Cir. 1989); *Jatoi v. Hurst-Euless-Bedford Hospital Auth.*, 807 F.2d 1214 (5th Cir.), *modified*, 819 F.2d 545 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); and *Greco v. Orange Memorial Hosp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). All three cases involved the same basic factual situation. A public entity leased a hospital to an ostensibly "private" corporation. The issue in each case was whether the corporation was a state actor. In *Albright* and *Greco* the court found no state action. In *Jatoi* the court found that there was state action.

In the Fifth Circuit's most recent analysis of the issue in *Albright* the Court acknowledged that there was some apparent conflict between its prior cases and recognized that a "fine line" separates *Jatoi* from *Greco*. 884 F.2d at 835. The Court pointed to a number of factors indicative of state, as opposed to private, action in this context. *Id.*

The Court found "major significance" in the fact that, in *Jatoi*, there was a "specially-created government entity" charged with overseeing the hospital *Id.* Thus, the State Legislature *itself* had created the hospital. By contrast, in *Albright* and *Greco*, the private corporation merely leased land from a preexisting government entity established for general purposes, not specifically to operate a hospital. The Court of Appeals in the present case acknowledged that: "[T]he District, a specially-created governmental entity, is the functional intermediary between the county and the Hospital." Slip Op. at 7. However, instead of giving this factor "major significance," the Court of appeals in the present case acknowledge the existence of the Hospital District, but gave its existence little, if any, weight in determining whether there was "state action."

The Fifth Circuit in *Albright* further noted that a "key difference" between *Jatoi* and *Greco* was that, in *Jatoi* "the hospital authority 'derived a direct financial benefit from its lessee' since the authority's repayment of bonds it issued and mortgages it entered into were dependent on the successful operation of the hospital." 884 F.2d at 839. The Court of Appeals in the present case noted: "Thus, the District derives a direct financial benefit from the Hospital because the repayment of its bonds depends on the successful operation of the operation of the Hospital. One of the grounds for terminating Cole was that his use of the facilities had a negative financial impact on the Hospital. That negative financial impact could affect the repayment of the District's bonds. The District and the Hospital are intertwined in a financially interdependent relationship." Slip Op. at 7, *citing*, *Albright*, 884 F.2d at 840. Indeed, a symbiotic, interdependent relationship

between the State and the "private" entity is one of the hallmarks of State action. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961). Yet, after acknowledging the existence of this fact, the Court of appeals in the present case gave this factor little, if any, weight in its ultimate decision of whether there was State action.

The Court of Appeals in the present case gave controlling weight to a single factor: *Jatoi* involved a charge of racial discrimination. This factor is mentioned in *Albright* but is afforded less weight than the factors which the present Court of appeals ignored. Here, the Legislature has specially created the Hospital, the Hospital was built with public funds, repayment of public depends upon its successful operation, and the Hospital has signed a lease recognizing that it is endowed with a public purpose. The Court of Appeals erred in holding that there was no fact issue on the question of state action.

* * *

(2)

Supreme Court, U.S.
FILED
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No. 96-1142

In The

Supreme Court of the United States

October Term, 1996

THOMAS C. COLE, JR. M.D.,

Petitioner,

v.

HUNTSVILLE MEMORIAL HOSPITAL,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals [First Dist.] Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

Did the court of appeals properly conclude that no state action was implicated when the Hospital decided not to renew Cole's staff privileges, given that

(1) Cole never pleaded a first amendment claim as to the Hospital;

(2) Cole never argued in the trial court, on appeal, or in the Texas Supreme Court that a different level of scrutiny should be afforded to the state action inquiry to accommodate his unasserted first amendment claim;

(3) the Hospital was not accused of racial discrimination against Cole, resulting in a more narrow construction of the state action concept;

(4) the Hospital, rather than the Walker County Hospital District, was ultimately responsible for daily maintenance and operation of its facility;

(5) no benefit to the Walker County Hospital District was directly attributable to the decision not to renew Cole's staff privileges;

(6) the Walker County Hospital District had no power to change the Hospital's decision, and did not directly or indirectly participate in the decision not to renew Cole's staff privileges; and

(7) Cole identifies no conflict between the decision below and any published decisions by this Court or any other court.

LIST OF PARTIES

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STATUTES INVOLVED

Cole's reference to the first amendment is superfluous because Cole never pleaded a first amendment claim against the Hospital. App. at 39.

STATEMENT OF THE CASE

Respondent Huntsville Memorial Hospital incorporates by reference the statement of the facts from the opinion below.

The Hospital notes the following misstatements and omissions in the petition.

- Cole contends he was subjected to retaliation because of his activities while he was a member of the Walker County Hospital District Board. Petition at 11. However, the initial recommendation not to renew his privileges was made in August 1987. Cole was not elected to the district board until November 1987.

- Cole asserts that the Hospital District agreed to pay certain operating expenses. Petition at 7. These payments were merely advances which have since been repaid by the Hospital.

- Cole's references to the submission of a plan of operation for approval by the Hospital District (Petition at 8-9) are irrelevant because these provisions came into play only if the Hospital opted not to contract with a professional hospital management company. The Hospital contracted with HCA Management Company, Inc. and Quorum Health Resources to operate the Hospital. Therefore, the provisions with respect to

plans or approval of such plans by the Hospital District were not in effect.

- Contrary to Cole's assertion at page 15 of the Petition, the Hospital was not formed to carry out a public purpose of the Hospital District. The Hospital was incorporated in 1927; the Hospital District was not created until 1971.

REASONS FOR DENYING THE WRIT

The facts of this case do not raise the issue put forth in Cole's petition.

Cole's petition berates the court of appeals for "choosing to ignore the First Amendment claims" (Petition at 18) and for not considering whether the state action standard "should require deference to the First Amendment" (Petition at 14). Cole's belated effort to conjure up a constitutional issue worthy of this Court's attention must be rejected because Cole

- did not assert a first amendment claim against the Hospital; and
- did not argue to any court below that the conventional standards for determining whether state action occurred should be altered based upon the presence of his purported first amendment claims.

In essence, Cole (who has been represented by counsel throughout these lengthy legal proceedings) complains that the court of appeals erred by failing to consider claims he never asserted, arguments he never made, and theories he never raised.

I. Cole Pleaded No First Amendment Claims Against The Hospital

Paragraph 26 of Cole's live pleading complains in generic fashion that the Hospital deprived him of "rights, privileges, or immunities secured by the Constitution and laws under color of law." App. at 39. Nowhere in that pleading does Cole refer to the first amendment or free speech rights in connection with his claims against the Hospital.

Cole's petition tries to obscure this fact by combining cites to his pleading against the hospital with cites and quotes from a *separate* lawsuit asserting *separate* claims against a *separate* group of defendants – namely, a collection of individual doctors. *See* Petition at 12-13 (citing "App. at 44, 45" and "App. at 37-45").

Unlike Cole's generic complaint in his pleading against the Hospital (App. at 39), his pleading against the individual doctors (beginning at page 40 of his Appendix) specifically alleged that Cole's "legal right to free speech" had been abridged by the individual doctors. App. at 44.

Of course, Cole's complaints against the individual doctors are immaterial for purposes of section 1983 because the actions of these private citizens were not alleged to constitute – and cannot constitute – state action. Cole's claims involving the individual doctors were resolved on independent and adequate state law grounds when the court of appeals affirmed the striking of all of Cole's claims as a proper sanction for discovery abuse under state procedural standards. App. 17-27. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)

(Supreme Court's "jurisdiction fails" if state court judgment rests upon independent and adequate state law grounds).

When one focuses solely upon Cole's pleading against the Hospital, it becomes apparent that the first amendment claim discussed in his petition for writ of certiorari is an after-the-fact invention. Global references to the "Constitution of the United States," the "Constitution and laws of the United States," or similarly broad phrases are insufficient to raise a federal question predicated on a particular portion of the federal Constitution. *Webb v. Webb*, 451 U.S. 493, 496-98 (1981); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902); *F. G. Oxley Stave Co. v. County of Butler*, 166 U.S. 648, 655 (1897).

As Cole's own appendix makes plain, he asserted no first amendment claim against the Hospital. It follows that he cannot now inject such a claim into this case in a belated effort to put a first amendment spin on this run-of-the-mill fight over hospital privileges.

II. Cole Never Argued Below That Free Speech Interests Are Implicated, Or That Such Interests Mandate A Different State Action Analysis

Cole's tactic cannot succeed even if one assumes he pleaded a first amendment claim against the Hospital with sufficient particularity. Cole never asserted below that the presence of this purported first amendment claim required a different level of scrutiny in connection with

the inquiry into whether the Hospital's activities constitute state action.

Cole appealed from the state trial court's grant of summary judgment in favor of the Hospital. Cole's response to the Hospital's motion for summary judgment neither mentions the first amendment nor asserts that the state action issue should be evaluated differently due to the presence of purported first amendment claims. App. at 47-56.

In his summary judgment response, Cole framed the constitutional issue *solely* in terms of whether (1) he enjoyed a protected property interest in the continuation of his medial staff privileges at the Hospital; and (2) he was deprived of this asserted property interest without due process. App. at 50-51. Although the court of appeals noted Cole's newly raised contention on appeal that he had asserted a first amendment claim against the Hospital (App. at 4), the court's opinion did not address that purported claim separately in conformity with state procedure precluding consideration on appeal of grounds for defeating summary judgment that were not raised by the non-movant in its response to the summary judgment motion. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677-79 (Tex. 1979); *see also Beck v. Washington*, 369 U.S. 541, 549-54 (1962) (federal question must be raised in state court in the manner and with the degree of specificity required by state rules of practice).

In any event, Cole never asserted below that the state action inquiry should be handled differently based upon the presence of purported free speech violations. App. at 51-56. Instead, he relied upon *Jatoi v. Hurst-Euless-Beford*

Hospital Auth., 807 F.2d 1214 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). App. at 54-55. The court of appeals properly recognized that *Jatoi* is inapplicable because it involved claims of racial discrimination which are absent here. App. at 7. The court then predicated its state action analysis on the factors enumerated in *Albright v. Longview Police Dept.*, 884 F.2d 835, 841 (5th Cir. 1989), and *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 877 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). App. at 7-11.

Cole's application for writ of error to the Texas Supreme Court makes no mention whatsoever of his new-found contention that the state action inquiry should be affected by the presence of purported free speech interests. App. at 74-76. Cole merely quibbles with the court of appeals' weighing of the non-speech factors discussed in *Jatoi*, *Albright*, and *Greco*. App. at 74-76. In fact, the petition for writ of certiorari itself really does not take issue with the court of appeals' analysis of these three cases; instead, Cole criticizes that court for failing to consider a factor he never asked it to consider. *See* Petition at 18.

This Court will not review a judgment rendered by the highest court of a state unless the claimed federal question at issue has been raised and decided in the state court below. *Yee v. Escandido*, 503 U.S. 519, 533 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, Court will refuse to consider claims that were not raised or addressed below); *Illinois v. Gates*, 462 U.S. 213, 217-18 (1983) (same). *See also Beck v. Washington*, 369 U.S. at 550-53 (because petitioner failed to raise argument in state court that state statute denied equal protection, question was not before the Supreme Court); *Herndon v.*

Georgia, 295 U.S. at 443 (failure to follow the appellate channels provided by the state court is fatal).

Cole's utter failure to present his free speech theory for consideration by the Texas state courts is sufficient by itself to justify denial of the petition for writ of certiorari. Cole's simultaneous failure to explain precisely how the court of appeals' decision in this case conflicts with any other cases addressing the state action question underscores the lack of merit of his petition. *See* Petition at 18.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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